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Seventieth session (second part)

Provisional summary record of the 3422nd meeting
Held at the Palais des Nations, Geneva, on Thursday, 5 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al Marri
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Commemoration of the seventieth anniversary of the Commission (agenda item 11) (*continued*)

Seventy Years of the International Law Commission: A Solemn Meeting

The Chair said that the current solemn meeting was the second to be held in commemoration of the Commission's seventieth anniversary, the first having taken place at United Nations Headquarters in New York in May.

Mr. Manley Hudson, following his election as the first Chair of the Commission on 12 April 1949, had referred to history as the driving force behind the Commission's work, noting that it was impossible for a jurist to "forget the lessons of history". In his view, the Commission must take into consideration the many gradual achievements of the past, while recognizing that history was in perpetual motion and that Commission members must not be slaves of the past. Speaking in 1949, he had clearly been referring to the ravages of the two world wars and the international community's failure to fulfil its promise to secure a lasting and stable peace. It was against that backdrop that the international community had set about honouring that unfulfilled promise through the maintenance and advancement of international law. As the title of the event, "Drawing a Balance for the Future", suggested, examining and learning from the past was an effective way of creating a better future. The Commission had been established to do just that, by assisting the General Assembly, under article 13 (1) of the Charter of the United Nations, to initiate studies and make recommendations to encourage the progressive development of international law and its codification.

Over the years, the Commission's work to progressively develop and codify international law, which had given rise to many multilateral treaties, had remained as relevant as ever and continued to be a valuable source of reference for international jurists. Indeed, the members of the Commission often referred back to the opinions expressed by their predecessors from the 1950s onwards in their search for better solutions for the future.

The codification process, by its very nature, was often lengthy. Although article 15 of the Commission's statute drew a distinction, for the sake of convenience, between the concepts of the progressive development and the codification of international law, in practice, the Commission's work on a given subject often involved both, with the balance struck between them varying according to the subject in question. In the context of the United Nations Decade of International Law, it had been pointed out that the progressive development and codification of international law, despite the distinction drawn in article 15 of the statute, appeared to have merged into a broader concept of codification, which was no longer simply viewed as the transposition of unwritten law into written law. That broader concept of codification, in turn, was closely linked to the observation that the final form of the Commission's work, whether stand-alone articles that would become part of a convention, draft guidelines, conclusions and principles, or a simple report, could perhaps be less important for the future than the complex process of codification and progressive development itself.

While the ultimate goal of all the Commission's work on a given topic was traditionally considered to be the development of a binding international treaty, recent experience had shown that not always to be the case. Some of the most authoritative and frequently invoked texts that had emerged from the Commission's work had not in fact become multilateral treaties. However, the fact that a final text for codification could take one of several forms did not mean that treaties had become obsolete instruments. Indeed, building a better future often required international consensus in treaty-making and, on occasion, the establishment of institutions or the harmonization of national laws through binding common rules. It was therefore highly significant that in 2016 the Commission had decided to recommend to the General Assembly the elaboration of multilateral treaty on the basis of the draft articles on the protection of persons in the event of disasters, and it was hoped that would also be the case in 2019 for the final text on crimes against humanity. Both texts had the potential to become treaties of great historical importance that would help secure the desired future of the international legal system.

The authoritative role of the Commission and the relevance of its output, even when it did not become a multilateral treaty, were attributable to the widespread recognition of the intellectual prowess of its members, past and present. Despite, or even owing to, their plurality, diversity and sometimes divergence, they had all helped the Commission find its collegiate voice. The Commission's working methods had been designed to ensure that its final product was always greater than the sum of its parts. The interplay between the balanced geographical distribution and the different legal traditions and systems represented in the composition of the Commission's membership was essential in that regard, as was the independence of individual members of their respective Governments. The prominent role played by the Commission's Secretariat, whose preparatory studies and substantive legal assistance were crucial to its proper functioning, had also proved essential. Except on a handful of occasions, the Commission had always met and conducted its substantive work in Geneva. The Commission was deeply grateful to the Government of the host State for its generous support over the years. The Commission likewise wished to thank the United Nations Office at Geneva, in particular its library and conference services staff, for its continued cooperation, which was vital for the smooth running of the Commission's annual meetings.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs and United Nations, the Legal Counsel) said that, during the earlier commemoration held on 21 May 2018 in New York, he had recalled that the International Law Commission had held its first session in Lake Success, New York, in 1949. It therefore seemed appropriate to add that the Commission's predecessor had met at the Palais des Nations in Geneva 25 years earlier. Indeed, on 12 December 1924, the Council of the League of Nations had established the Committee on the Progressive Development of International Law and its Codification in the very room in which the current meeting was being held.

Like the members of the Commission, the members of the Committee had served in their personal capacity and had, as a whole, represented the main forms of civilization and the principal legal systems of the world. The commemorative meeting provided an opportunity to pay tribute to the achievements of the Commission over the past 70 years and to honour the efforts of those who had laboured for the ideal of the progressive development and codification of international law prior to its establishment.

Over the years, Geneva had remained at the heart of codification efforts. The successes of the Commission over seven decades could be ascribed, in part, to the unrivalled facilities of the Palais des Nations, and to the generous hospitality of Switzerland, its host country. Removed, though not isolated from the dynamics of New York, Geneva had proven highly conducive to the serious study of and debate on complex questions of international law. It was only fitting that the Commission should retain its seat in Geneva, where the first organized international efforts to codify and progressively develop international law had started almost a century before.

Echoing the words of his erstwhile predecessor, Mr. Ivan Kerno, pronounced at the Commission's very first session, he recalled that international law ought to serve as a shelter to mankind and that only under its protective roof could the States Members of the United Nations find the international peace which the Organization had been established to ensure and maintain. The framers of the Charter of the United Nations had affirmed the central role of international law in the architecture of peaceful relations between States, a role which had not changed more than seven decades later. The Commission remained at the centre of efforts to develop and strengthen the international legal order. It was to be hoped that international law would continue to provide a shelter to mankind in the years to come.

Ms. Cicéron Bühler (Federal Department of Foreign Affairs, Switzerland), speaking as the representative of the host State for the Commission's annual sessions, said that international power relations were changing against a backdrop of globalization and fragmentation. While international relations had taken on greater importance, they had also become more complex. Far from having had its day, international law continued to play a fundamental role in relations between States. Indeed, its progressive development and codification was the key to maintaining a stable, just and peaceful international order, particularly in a world that was undergoing a period of upheaval.

As a small, but highly interconnected State, Switzerland had a keen interest in maintaining and strengthening international law. The strengthening of international law was not only a fundamental element of the Charter of the United Nations but also of Swiss foreign policy. No country or actor on the international scene could find the answers to contemporary challenges alone. The same was true of questions of law, which was why the work of the Commission was so important.

The Commission continued to work on questions of general international law, such as the law of treaties and the immunity of State officials, and contemporary problems, such as the protection of the atmosphere, the protection of the environment in relation to armed conflicts and the protection of persons in the event of disasters. The Commission was also called upon to oversee the progressive development of new norms designed to address modern-day challenges. The relevance and effectiveness of international law would only increase in the future.

The value of the Commission's work was well established, as its draft articles were considered highly authoritative in practice and were often interpreted as statements of law by national courts. It was therefore a great honour for Switzerland to host the Commission in Geneva and, in so doing, to contribute to its important work. As had been recalled by Ambassador Jürg Lauber at the first solemn meeting in New York, holding the Commission's meetings in Geneva ensured its complete independence from the Sixth Committee, whose work was also greatly appreciated by Switzerland. The differing legal cultures of the two bodies benefited international law, while the Commission's presence in Geneva encouraged synergies with numerous Geneva-based international organizations and international actors.

It was critical for international law to be promoted not only from United Nations Headquarters in New York, but also from Geneva. In that connection, she drew attention to the International Law Seminar held in Geneva each year, which enabled students, professors and officials to learn about the Commission's work. She wished to assure those present that Switzerland remained committed to supporting the work of the Commission and to taking the steps necessary to ensure that its members were able to work in an environment favourable to the proper conduct of its work.

Ms. Gilmore (United Nations Deputy High Commissioner for Human Rights) said that, founded seven decades previously in the aftermath of war, the International Law Commission was coincident in genesis with the Universal Declaration of Human Rights and had played a leading role in progressively developing and codifying the international legal rules that underpinned efforts to defend its values. Since then, the Commission had worked to ensure that access to justice was universal and not determined by place of birth, skin colour, gender or any other identity and that those who inflicted injury or should have prevented it were held to account.

The Commission was to be commended for its enormous contribution to the development of international law in the field of State responsibility and for having helped pave the way for the establishment of the International Criminal Court. The Office of the United Nations High Commissioner for Human Rights (OHCHR) highly valued the Commission's work, which had proven essential for the fulfilment of the panoply of mandates within the United Nations human rights system. Members of treaty bodies, independent experts and special rapporteurs alike had all made reference to the legal norms that the Commission had so expertly crafted. OHCHR was seeking to extend their application as it worked to fulfil the promise of the Universal Declaration of Human Rights, address gaps in human rights protection and help States and civil society to develop the capacity to provide that protection.

Despite the prohibition of crimes against humanity being clearly established and widely recognized within the international community, such crimes remained a daily reality in contexts of conflict, crisis and State collapse. Against that backdrop, the Commission's work on a draft convention on crimes against humanity had never carried more importance or held deeper promise, particularly for OHCHR-led commissions of inquiry and fact-finding missions for the investigation of grave violations of international human rights law and international humanitarian law.

She urged the Commission to maintain its momentum, as there was a great need for its work on the harmonization of domestic legal frameworks with international norms on crimes against humanity, the inclusion of the non-applicability of statutes of limitations for such crimes, the universal application and non-derogability of those obligations, even under exceptional circumstances, and the immunity of State officials from foreign criminal jurisdiction.

OHCHR would continue to cooperate with the Commission, the wider international human rights system and all those who looked to the law as a means of upholding human rights. She hoped that equality before the law and the rule of law could be extended further so as to protect all those persons whose rights were under threat or had been violated.

A musical interlude took place, in which the Arlequin Trio performed Cinq pièces en trio *by Jacques Ibert.*

Mr. Yusuf (President of the International Court of Justice) said that the work of the International Law Commission had played and continued to play a crucial role in the daily work of many international jurists and had ensured the continued development of the international legal system. In order to draw a balance for the future, it was necessary to examine how the Commission had fulfilled its mandate in the light of the changes to the structure and composition of the international community over the past seventy years and how successful it had been in facilitating the adaptation of existing international legal norms to the changing international context.

Whereas the mandate and work of the Commission's predecessor, the Committee on the Progressive Development of International Law and its Codification, had been limited by the restrictive nineteenth century conception of international law that was prevalent at that time, by the time the Commission had been established in 1947, the world had undergone dramatic changes. The adoption of the Atlantic Charter and the Charter of the United Nations in 1941 and 1945, respectively, had laid the foundation for a new international legal system with universalist aspirations, centred around the principles of equal rights, the self-determination of peoples and the protection of human rights.

The new norms adopted by the Commission had been enriched by the views and positions articulated by newly independent States in the outcome document of the Asia-Africa Conference held in Bandung, Indonesia, in 1955 and in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted as General Assembly resolution 1514 in 1960. The gradual growth in the membership of the United Nations following the Commission's establishment was attributable to a profound societal change, which had led to the emergence of a diverse body of actors, each with their own culture, customs and legal traditions. It was against the backdrop of decolonization that the Commission had recognized the need to modify its existing approach to codifying customary international law to take into account the views, perspectives and legal systems of new States, pursuant to article 8 of its statute, and had begun to view the progressive development and codification of international law as two parts of the same whole. Thus, the Commission's work was no longer limited to the systematization of practices and usages, some of which could well have been out of tune with new international realities.

It was not paradoxical to claim that the universality of international law depended on diversity. Indeed, achieving its universalization entailed borrowing and adapting concepts and principles from different legal traditions. Moreover, the legitimacy of international law depended to a great extent on having the ability to represent diverse legal traditions. The Commission's endeavours were characterized by a willingness to reflect the views of the entire international community and an openness to diverse perspectives. For example, it had taken due account of the concerns raised by newly independent States and the General Assembly in its work on the law of treaties through the inclusion of provisions on the invalidity of treaties whose conclusion had been procured through threat or the use of force and in its work on the succession of States in respect of treaties, in which the related Nyerere doctrine and the principle of self-determination were duly reflected. The Commission was likewise to be commended for having included the concept of peremptory norms of general international law (*jus cogens*) in its work on the law of treaties and for its work on the succession of States in respect of matters other than treaties, insofar as it

explicitly acknowledged the principle of permanent sovereignty of natural resources, which was of great importance to developing States.

The Commission's work had clearly shown that legal norms could be adapted to societal change and had led to an increase in the number of international norms recognized by all members of the international community. Furthermore, the Commission had succeeded in shifting the principal source of law-making from custom to multilateral conventions and a codified set of rules in certain fields. However, while certain elements of the Commission's work — for example, article 33 (2) of its articles on responsibility of States for internationally wrongful acts — recognized the ability of individuals to hold rights under international law, it had only acknowledged, as a recommended practice under its draft articles on diplomatic protection, that reparation should accrue directly to an individual when his or her rights had been violated. The Commission should take steps to remedy that situation.

The future held even greater challenges for the Commission and the international legal system as a whole. Recent developments showed that the most fundamental rules and principles of international law were being threatened by those wishing to abandon multilateralism in favour of unilateralism. The sanctity of treaties and the very principle of *pacta sunt servanda* were likewise being put to the test as a result of a growing tendency to repudiate international treaty commitments almost immediately. Such attempts to render agreements among States less durable and more fragile was a threat to the international rule of law. To equate a change of government or ruling political party to the doctrine of *rebus sic stantibus* also posed a threat to the rule of law and to its predictability and stability. The Commission must respond to those threats by continuing to promote multilateralism and inclusiveness and by raising awareness among Governments of the importance of such concepts for international law and the international rule of law. It should also continue to promote proper observance of the rules of international law in the interest of humanity as a whole and to disseminate the message that the well-being and progress of all nations depended on multilateral cooperation based on the rule of law and that shared values and common rules were the key to achieving peace and harmony among nations.

The Chair, in drawing the solemn meeting to a close, thanked Mr. Yusuf for his eloquent and courageous statement and said that it had served as a helpful reminder of the Commission's past achievements, the current circumstances in which the international community found itself and the work that the Commission needed to do to meet the challenges of the twenty-first century.

Panel 1: The Commission and its impact

The Chair invited Mr. Nolte to introduce the panel discussion.

Mr. Nolte (International Law Commission), moderator, said that the panel discussions were a fundamental feature of the events to mark the seventieth anniversary of the Commission, as they were central to the aim of "drawing a balance for the future", which entailed not only commemorating the anniversary, but also reflecting on how to prepare the Commission for future challenges, some of which might be rooted in the present.

The sixtieth anniversary celebrations had been more low-key and had not given rise to an official anniversary publication. They had been held against a backdrop of a sense of stagnation and a crisis of self-confidence in the Commission, encapsulated in an academic article by Christian Tomuschat entitled "*The International Law Commission: An Outdated Institution?*", in which the author had expressed scepticism about the Commission's future role and wondered what work was left to be done, since the Commission had, in his view, progressively developed and successfully codified the major general rules of international law.

The current situation was completely different. The Commission was dealing with a large number of important topics at a more rapid pace than ever before. The number of new topics which had been proposed actually exceeded its capacity. There was a higher rate of participation in the Drafting Committee and an unprecedented number of young people were interested in working as assistants to the members.

One of the purposes of the colloquium was to have the Commission's state of health checked by recognized experts, in other words renowned academics whose findings would then be discussed by the legal advisers of States and international organizations.

The panel discussions should produce lasting impetus which would enhance and safeguard the Commission's unique function of progressively developing and codifying international law. A report of the panel discussions would be produced and presented during the International Law Week in New York in 2018 and speakers' written contributions and the proceedings would be published in book form as a reference point for a wider debate about the Commission's performance in fulfilling its mandate.

There were, of course, limits to the Commission's capacity. The current turbulence on the international political scene might bode ill for the progressive development and codification of international law and might affect the Commission directly or indirectly. States, courts, international organizations or other actors might not be receptive to the increased activity of the Commission. The only way that the Commission could respond to those challenges to the international rule of law was to base its work on authoritative sources, to present its work in a transparent and well-argued fashion and to maintain its cohesion in order to remind States and other actors that there was a common basis on which peaceful and fruitful international relations needed to be conducted in everyone's common interest.

The five panels would focus on questions of immediate interest to the Commission, but each of the topics was affected by broader political and other developments. The subject of the first panel — "The Commission and its impact" — called for consideration of the Commission's role in relation to its addressees and international law as a whole. The second panel — "The working methods of the Commission" — concentrated more on technical matters, but working methods might well be mirrors or symptoms of more general policy or developments. The third panel — "The function of the Commission: How much identifying existing law, how much proposing new law" — addressed a classic question which had acquired greater significance, given that the products of the Commission's work were more frequently used by national and regional courts than they had been in the past. The fourth panel — "The changing landscape of international law" — was also concerned with matters which were high on the Commission's current agenda, namely how to determine the priority of the multitude of areas where the Commission could possibly contribute. The title of the fifth panel — "The authority and the membership of the Commission" — might suggest that there was a connection between the Commission's authority and its membership, but panellists were obviously free to question whether and to what extent that was the case

The Chair invited Mr. Comissário Afonso to introduce and moderate the panel discussion on the Commission and its impact.

Mr. Comissário Afonso (former member of the International Law Commission), moderator, said that the celebration of the seventieth anniversary of the International Law Commission was a momentous event. It was an opportunity to reflect on the centrality of international law to current international relations. The participants in the celebration came from different backgrounds and walks of life. Those who had followed law and diplomacy for many years had been able to draw an obvious lesson from the Charter of the United Nations, namely that even sovereign States needed law internally in order to function properly and at the international level in order to coexist and cooperate with other sovereign States. For that reason, international law was an important source of international order and justice, as had been shown very clearly in a book entitled *Peace through International Law. The Role of the International Law Commission*, edited by Georg Nolte, which had been published at the time of the sixtieth anniversary of the International Law Commission. Many of the insights and conclusions from that book were still relevant. The world would continue to need the International Law Commission for many years to come, as it was central to the international rule of law.

Mr. Rodiles (Mexico Autonomous Institute of Technology (ITAM)), panellist, said that there were many different possible approaches to understanding the impact of the Commission's work on international law. The numerous references by diverse legal entities

to its draft articles, guidelines and conclusions testified to the Commission's authority as a body that generated international law, including in the form of soft law and international standards. Furthermore the fact that international courts, quasi-judicial bodies and arbitration tribunals made great use of the articles on responsibility of States for internationally wrongful acts in a number of areas such as bilateral or multilateral investment agreements, was an indication of the Commission's importance for the long-term development of case law. Domestic courts throughout the world also used the Commission's products in some specific circumstances, and those products likewise had an impact on domestic law in many regions.

The Commission had a hand in inculcating a knowledge of international law. After the earthquake in Mexico in 2017, he had found from a survey conducted by his students that the draft articles on the protection of persons in the event of disasters had had a real impact in disseminating knowledge of existing soft-law standards that could promote a better response to natural disasters. That study had also demonstrated the relevance of international law for the everyday lives of real people.

Turning to the impact of the composition of the Commission and its institutional environment, he agreed that international law was undergoing a radical transformation. Although more matters were being regulated by international law, the main issue was how to ensure that a traditional body operating within a set institutional framework could have an impact despite the structural shifts that were taking place within the international law system. The crux of the matter was not so much that new sectors were being regulated, but that the methods for creating new international legal norms were changing. Perhaps that was why Neil Walker in his book *Intimations of Global Law* had suggested that there was a need for trend-spotting within different normative tendencies. However, the Commission's composition, methods of work and institutional framework were such that, if it were to engage in trend-spotting, it would forfeit some of its legitimacy. He wondered how the Commission could meet the challenge of those developments without losing the authority deriving from its institutional history, or becoming irrelevant. In the written text which he had submitted he had been inspired by an article by Mathias Forteau, which had also focused on those new trends and in which the author had argued that it was necessary to understand international comparative law from within the system and to restate international law. Hence it was vital to understand those normative tendencies from a systemic viewpoint and to examine the legal effects of and interaction between various normative regimes, not forgetting informal normative regimes.

The Commission's study of the fragmentation of international law provided some insight into how to deal with the nexus of regimes, for example when developments in treaties between States had repercussions elsewhere. Mr. Gómez-Robledo's work was highly relevant to issues arising from the provisional application of treaties, for example when an informal coalition of States parties called for the gradual application of measures which had not yet entered into force. Mr. Nolte's research into subsequent agreements and subsequent practice in relation to the interpretation of treaties explained the process whereby developments in formal and informal regimes could be classed as subsequent practice. Indeed, the substantial amount of work done by the Commission in determining what amounted to subsequent agreements and subsequent practice provided a conceptual framework for understanding how the law of treaties was changing. That elucidatory function of the Commission could lead to a restatement of international law and might enable it to counter the risk of treaty fatigue. It could not, however, reverse new trends and return to a previous golden era of codification.

The Commission had often been criticised for restating various aspects of the law of treaties or of customary international law, yet that work offered the potential for giving the Commission the requisite resilience within the new international law environment and might explain the resilience of international law itself. The Commission's topics were not purely academic issues for purists. Max Weber had demonstrated that law was a legal power system which was essential for the rule of law, transparency, predictability and fair participation in the international community. The Commission's work was part of a struggle to uphold the ideals of the rule of law in the modern world.

Ms. Boisson de Chazournes (University of Geneva), panellist, said that, although on some occasions the bell had tolled for the Commission, everyone had to acknowledge that it constituted an invaluable mechanism enabling the international community to clarify and develop the rules of international law. The Commission's achievements over the previous 70 years had been remarkable in many respects and had laid a sound foundation for the contemporary legal order. The time had, however, come to take a realistic look at the future.

While the impact of the Commission's work was most often felt in relation to the law of treaties, that work took different forms in accordance with article 23 of the Commission's statute; the Commission had adopted draft treaties, draft articles, resolutions, guides and reports, all of which had had an impact on the normativity of the international legal order. In that context, a distinction had to be drawn between hard law, in other words treaties which had entered into force, and soft law which encompassed many different kinds of instruments. It might therefore be useful to look more closely at soft law as a source of international law as, even though normativity was usually associated with the binding nature of a text which was intended to have legal effects, a non-binding legal instrument also produced legal effects which, though different to those of a treaty which had entered into force, made it possible to reconcile differing legal tendencies and interests and thereby gradually pave the way for the adoption of a norm of international law. Soft law was also an important source of inspiration for States when they adopted national or transnational laws.

Treaties nonetheless remained the principal task of the Commission and they still provided legal certainty and predictability. The Commission's consideration of 41 topics had led to the adoption of 23 treaties, 19 of which had entered into force. Out of those 19 treaties, 7 had been ratified by at least 40 parties. That quantitative approach nonetheless gave a distorted view of the real situation, since the content of those treaties formed the keystone of the international legal order. In the previous 20 years, only two conventions had resulted from the Commission's deliberations, namely the Convention on the Law of the Non-navigational Uses of International Watercourses of 1997 and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, neither of which had entered into force. Although that situation might seem to suggest that the era of treaty-making was over, that was not really the case as the Commission was currently engaged in work on two topics which might culminate in a convention.

The lack of appetite for international multilateral treaty-making, or treaty fatigue, had to be taken into account. Treaties had played a very important role after 1945 in building the international legal order, in the sixties for making the international legal order more inclusive, during the Cold War for establishing common rules and after the fall of the Berlin Wall for building a new legal, political and economic order. Since then, new normative trends had emerged. States apparently preferred declarations adopted at the end of summits and memorandums of understanding, although it was unclear to what extent the latter were binding. While little of the Commission's more recent work had led to the adoption of international treaties, it had drafted some texts which were of major importance. They included the articles on responsibility of States for internationally wrongful acts, the draft statute for an international criminal court, which had acted as a catalyst for the adoption of the Rome Statute, and the draft articles on the law of transboundary aquifers, to which many Arab and African States made frequent reference. It could therefore be said that the form of the Commission's work had little bearing on its impact.

The value of its work depended on the regard in which other entities held it. The International Court of Justice, with which the Commission entertained a very close relationship, played the lead role in that context. The Court paid little attention to the form of the instrument to which it referred and sometimes even disregarded the distinction between *lex lata* and *lex ferenda*. On the other hand, some international courts, whose judgments strayed somewhat from the Commission's thinking, should give greater heed to the content of the reports adopted by the Commission. That was true of the European Court of Human Rights in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* in relation to the draft articles on the responsibility of international organizations

and also of the way in which many investment tribunals construed the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.

It was interesting to note that other users of the Commission's work, such as legal advisers, negotiators of international agreements, diplomats, international organizations and civil society associations, looked not only at the final product but also at the reports of the Special Rapporteurs and working groups, which functioned as the encyclopaedia of international practice for all those actors when they had to identify the applicable rules.

In conclusion, it could be said that the Commission had authority and other actors deferred to it. That authority rested *inter alia* on the fact that it was the only universal body that contributed to the development of international law. The Commission could do so only if its work was supported by States in both the short and the long term. In the long term, it would be wise to reflect on the new forms of normativity in the international legal order.

Mr. Šturma (International Law Commission), panellist, noting the references to a golden era of codification, said that there was no denying that the most important codification conventions had been adopted in the 1960s. It was equally true that States were currently less interested in acceding to binding treaties. The Commission therefore had to explore innovative methods of work when tackling new topics. He concurred that the authority of the Commission's products did not necessarily depend on their binding nature; even soft law, including draft articles, or conventions which had not yet entered into force, might serve the needs of the international community. For example, the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts had proved useful when some central European States had had to contend with those issues.

Mr. Rodiles had rightly referred to the Commission's study of the fragmentation of international law, which was one of the Commission's most important achievements. At the same time, the Commission should not neglect more traditional topics.

Another interesting question was whether the Commission should adopt a different approach in response to the latest trends in academia and in the real world of international law. The Commission could indeed look at the many new schools of thought and monitor developments. It also had to bear in mind States' preference for informal instruments. However, it should adapt to that new situation only up to a certain point. Of course, in the context of the topic for which he was Special Rapporteur, namely succession of States in respect of State responsibility, he was aware of the interesting research project concerning shared responsibility conducted by the Amsterdam Center for International Law, which might be helpful when the Commission considered divided or shared responsibility in situations of succession.

Ms. Boisson de Chazournes had raised the extremely relevant point of how the Commission was regarded by others. When reflecting on traditional and modern approaches, it was essential to remember the Commission's identity, audience and language. He still believed that the Commission was part of the invisible college of international law. It was not an intergovernmental body or the bar of the International Court of Justice. However, because the members were elected by the General Assembly, the Commission must speak to a variety of actors, including States through the Sixth Committee, international courts and academia. That made its task quite difficult. The Commission might take up new topics and enter into uncharted waters, but at the same time it must endeavour to be understood by different actors. That was precisely the reason why it should cleave to the more old-fashioned language of international law.

Mr. Comissário Afonso (former member of the International Law Commission), moderator, invited the participants to put questions to the panellists.

Mr. Alabrune (Ministry of Foreign Affairs, France) said that the role played by States with respect to the Commission's products differed greatly depending on whether the latter were treaties or soft-law instruments. Treaties required negotiation between States and then, possibly, ratification. Governments and, in most States, parliaments were therefore involved in the process. That difference should be borne in mind by the Commission, since, even if conventions were not always ratified, they called for

commitment by States and therefore the relationship with the rule of law was dissimilar to that in the case of softer norms. Conventions were therefore clearly in the interest of States.

Mr. Figueredo Corrales (Ministry of Foreign Affairs, Paraguay) said that he wished to pay tribute to the fruitful work done by the Commission over the previous 70 years. Roberto Ago, Hersch Lauterpacht, Eduardo Jiménez de Aréchaga and many other leading jurists had contributed to the great codification exercise in the 1960s. The Vienna Convention on the Law of Treaties and the Vienna Conventions on diplomatic and consular relations had been some of the milestones in its work and, at the time, had been topics of the utmost relevance. The Commission's current modernization exercise mirrored the real world and might lead to further multilateral treaties or the approval of draft articles. The fact that the preamble to the Guarani Aquifer Agreement, which had been drafted two years after the adoption of the draft articles on the law of transboundary aquifers in the Commission, actually mentioned the latter draft articles reflected the extent to which the Commission's work had helped to develop hard law and had acted as a guide and benchmark for legal theory. States therefore owed the Commission a very great deal, because, without its guidance and leadership, they would be stumbling along in the dark. The draft statute for an international criminal court had become the Rome Statute and a virtually universal instrument. His own Government had recently promulgated legislation to implement the provisions of the Statute.

Mr. Abi-Saab (Graduate Institute of International and Development Studies, Geneva) said that, when he had been an international law student in the 1950s, the only available reference material had been common law or recondite legal theory. The Commission had played a very important role in transforming the main body of international law into written law. Dealing with written law was a very different prospect, irrespective of whether that law was binding, as it was possible to consult universal forward-looking texts instead of poring over general abstract theory or sifting through cases in order to extract a general rule.

Mr. Loko (Director of Legal Affairs (retired), Ministry of Foreign Affairs, Benin) said that he had the impression that speakers were tiptoeing around the issues. He wondered whether, when discussing the impact of the Commission's work and given that international politics had implications for all the peoples of the world, it was not necessary to bear in mind the challenges related to the rule of law stemming from the fragmentation of international law.

Mr. Rodiles (Mexico Autonomous Institute of Technology (ITAM)), panellist, replying to the last question, said that the global normative trends which he had mentioned in his statement were not academic inventions but indeed reflected the current practice of both new and traditional players, in other words States and international organizations, which were no longer behaving in the way they had always done in the past. The greatest challenge to the Commission lay in ensuring that it retained its normative authority and its capacity to generate international law. It therefore had to continue to think rationally, respect the institutional framework within which it operated and preserve its methods of work, while not losing any of its relevance. Hence its work to restate international law was crucial. He regretted that the Commission was no longer in its codification heyday, but it could not ignore treaty fatigue. On the other hand, its current consideration of systemic questions related to secondary law was helping to shed light on those new global normative trends and furthered the values and ideals of the rule of law, such as predictability, fair participation and transparency.

Ms. Boisson de Chazournes (University of Geneva), replying to the comments by Mr. Alabrune, said treaties were a valuable means of consolidating the international legal order, precisely because States and national parliaments could have their say during their negotiation. In view of the current situation, account had to be taken of the fact that States had other means of asserting their viewpoint. An instrument which was not binding in itself, but which codified international law, such as the articles on responsibility of States for internationally wrongful acts, was extremely important for the international community. Much of the Commission's current work consisted in the clarification or progressive development of rules contained in conventions which had been proposed by the Commission. It was true that those instruments would not be submitted to a negotiation

conference or to national parliaments. They were however forwarded to the Member States for comment, at which juncture they could express their viewpoints. The Sixth Committee then had its role to play. The Commission's authority inherently depended on its close links with that Committee and the latter's reactions. She hoped that further multilateral treaties would be negotiated by the Commission and that the Commission would think about finding a more democratic and stronger political basis for its work in the international community.

Mr. Šturma (International Law Commission), panellist, said that he agreed that the preparation of draft conventions and non-binding instruments entailed different processes. The crucial point was that the Commission should foster the authority of international law in a variety of ways. It could draw up a statement of law or draft articles of future conventions. If States asked the Commission to prepare a convention, it would be pleased to oblige, although it realized that it would then be up to States to negotiate and adopt the final text, since it lay with States to determine the final form of the Commission's work.

Mr. Comissário Afonso (former member of the International Law Commission), moderator, said that he wished to thank the panellists for their excellent presentations.

The meeting rose at 1.05 p.m.

Provisional

For participants only

2 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3423rd meeting
Held at the Palais des Nations, Geneva, on Thursday, 5 July 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Commemoration of the seventieth anniversary of the Commission (agenda item 11) (*continued*)

Panel 2: The working methods of the Commission

The Chair invited Mr. Gajić to introduce and moderate the panel discussion on the working methods of the Commission.

Mr. Gajić (Ministry of Foreign Affairs, Serbia), moderator, said that the International Court of Justice and the International Law Commission, the former being the principal judicial organ of the United Nations and the latter its principal institution for codification and progressive development, were indispensable institutions in the field of international public law. But it was the Commission whose reputation and authority appeared indisputable. Indeed, the impact of its work could be observed in academia, foreign policy and international justice. Although the Commission's members had shown themselves capable of dealing with the most important and sensitive issues of international law, its reputation and authority were due in large part to its working methods.

In that context, he invited the three panellists for panel discussion 2 to address the theme of the Commission's working methods.

Ms. Azaria (University College London), panellist, said that, in the twenty-first century, the Commission had increasingly moved away from a paradigm of "codification by convention" towards the preparation of instruments that were intended to remain non-binding. Various factors might encourage States and national and international courts and tribunals to rely on such non-binding outputs. They included the Commission's geographically representative membership, the fact that it was institutionally required to interact with Governments and the high quality of its work, which was inextricably linked with its working methods. However, numerous challenges had emerged since the Commission's establishment, including an increase in the number of States, the enlargement of the Commission's membership, the conclusion of a larger number of multilateral treaties, a proliferation of international courts and tribunals and the growing retreat of some States from international law, especially from multilateralism. Those challenges had increased the need for further reflection on the Commission's working methods.

Although a distinction was made in the Statute of the International Law Commission between progressive development and codification, the Commission had in practice tended not to make a distinction between those two functions in its working methods. Neither had the Commission tailored its procedures to the expected outcome of its work on a given topic or the nature of the rules with which that topic primarily dealt. The Commission had instead made such distinctions on a purely *ad hoc* basis. The Commission had a practice of not classifying its output for a given topic as progressive development or codification. It sometimes indicated in the introduction to its commentaries that there were instances of both in a topic. Occasionally, it clarified in the commentary to a specific provision that it represented *lex lata* or *lex ferenda*. States sometimes expressed concern that international courts and tribunals attached excessive authority to the Commission's pronouncements by assuming that they all reflected existing law. Such criticisms might become more trenchant in an era in which codification through non-binding instruments was becoming the dominant paradigm. The Commission might thus be encouraged to demonstrate a consistent and transparent adherence to methodology in relation to its pronouncements.

In its commentary to draft conclusion 14 of the draft conclusions on identification of customary international law, the Commission stated that assessing the authority of a given work of an international expert body was essential as part of the process of identifying subsidiary means for the determination of rules of law. According to the Commission, the value of each output had to be carefully assessed in the light of the mandate and expertise of the body concerned, the "care and objectivity" with which it worked on a particular issue, the support that a particular output enjoyed within the body and the reception of the output by States. The Commission's use of the expression "care and objectivity" corresponded to Thomas Franck's use of the word "adherence". Franck argued that rules that were

legitimate were more likely to be complied with, and one of the factors that made rules legitimate was their adherence to secondary rules. The Commission's consistent "adherence" to a methodology for identifying and interpreting rules of international law operated as a restraint over its discretion by anchoring its work in State practice and international jurisprudence.

The Commission's recent work on the identification and interpretation of international law, including in the context of the identification of customary international law and peremptory norms of general international law (*jus cogens*), could serve as an invaluable guide for the Commission itself. Indeed, the secondary rules that the Commission had developed for those topics should be used to guide its own work. Progressive development also required "care and objectivity", and the Commission ought to follow a consistent method in that regard. The Commission's commentaries, in which it explained a draft text with appropriate references to practice, judicial decisions and doctrine, provided evidence of the "care and objectivity" of its reasoning. In addition, the commentaries had a major legal significance, as international courts and tribunals often relied on them.

As at 30 April 2018, the International Court of Justice had expressly relied on the Commission's work in a total of 23 cases. In those 23 cases, the Court had relied on the Commission's work in relation to a total of 35 separate legal questions. It had relied on the Commission's commentaries in 14 of those 23 cases. The Commission's commentaries provided the context in which its draft provisions were to be interpreted, and that context was important in practice. In two cases brought in response to separate applications filed by the Marshall Islands against India and the United Kingdom of Great Britain and Northern Ireland, which had been heard as cases entitled *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, India and the United Kingdom had objected to the Court's jurisdiction by arguing that article 43 of the articles on responsibility of States for internationally wrongful acts required the injured State to give notice of its claim to the State allegedly responsible. The Court had rejected that argument on the basis of an interpretation of article 43 informed by the Commission's commentary to article 44.

The Commission's usual working method was to hold a discussion of the special rapporteur's report in the plenary in order to decide which proposals to refer to the Drafting Committee. Once the Drafting Committee had adopted the draft provisions, they were submitted to the plenary for adoption on first reading along with the commentaries. The same process was followed for their adoption on second reading, although the comments of Governments were also taken into account at that stage. The reports of special rapporteurs were the principal tool for the development of the Commission's work and, alongside comments in the plenary and discussions in the Drafting Committee, were a springboard for the preparation of commentaries. Special rapporteurs and the quality of their reports were critical to the progress of a topic.

Owing to its function, informality and composition, the Drafting Committee made an extraordinary contribution. Its negotiations were painstakingly detailed and touched on issues of technical drafting and legal substance, *inter alia*. However, the Drafting Committee's workload prevented it from producing commentaries. The usual practice was for the special rapporteur to prepare and revise the commentaries on a given set of draft provisions once the Drafting Committee had provisionally adopted them. The Commission adopted its commentaries in the plenary, usually towards the end of the session, but the fact that they were considered so late in the session introduced an element of time pressure. Commission members had ample time in which to consider commentaries in detail before they were adopted on second reading, but international courts and tribunals had also relied on draft articles and commentaries adopted on first reading. There might be some merit in decreasing the number of topics for which draft provisions were referred to the Drafting Committee, but she did not envisage the Commission making such a concession in the immediate future.

In recent years, the draft provisions for some topics had been kept in the Drafting Committee for some time. After a few years, once the Drafting Committee had adopted those provisions, the special rapporteur prepared the commentaries with the assistance of a

working group. The texts and commentaries were then all adopted in the plenary on first reading. The Commission seemed to be taking that approach for the topic of peremptory norms of general international law (*jus cogens*). It was worth considering the implications of such an approach with a focus on the commentaries.

First, working groups had previously assisted in the preparation of commentaries. Such working groups did not negotiate or prepare commentaries, but instead assisted the special rapporteur in the light of the enormous volume of material to be assessed, which gave a larger number of Commission members a degree of ownership over the commentaries and thereby enabled consensus and saved time in the plenary. It might be worth giving consideration to the possibility of replicating that practice in the future.

Secondly, it had been suggested that it might be more efficient to prepare the commentaries once the Drafting Committee had adopted all the draft provisions for a particular topic. However, it might be easier to secure agreement on a given draft provision if the commentaries to other draft provisions for the same topic were already available. In addition, if the commentaries were not considered until the end of the Commission's consideration of a topic, their preparation would be too far removed from the work of the Drafting Committee, and certain nuances might be lost, particularly if a new special rapporteur had been appointed.

Thirdly, the statements of the Chair of the Drafting Committee had been published since 2012. They included an annex containing the draft provisions that the Drafting Committee had adopted. The publication of such statements had encouraged the Sixth Committee to read and react to the draft provisions, which allowed the Drafting Committee and the special rapporteur to make further changes before the commentaries were adopted on first reading and therefore saved time. However, the manner in which the Commission made reference in its reports to texts that had been provisionally adopted by the Drafting Committee was currently inconsistent. It was also unclear whether States in the Sixth Committee were commenting on the Drafting Committee's output or the special rapporteur's report. If they commented on the latter, they could be commenting on proposals that had already been revised by the Drafting Committee; if they commented on the former without reference to the commentaries, they would not be seeing the Drafting Committee's draft provisions in context.

Lastly, if the Commission adopted the commentaries on first reading, States were presented with a large quantity of material and usually had little over a year in which to submit written comments, which would be challenging even for a State that had a large legal staff in its ministry of foreign affairs.

In that context, the Commission should reflect on the role, preparation and adoption of commentaries as a matter of priority, given their importance in judicial practice and for the Commission itself. It was important to facilitate a meaningful review of the commentaries in the plenary. To that end, Commission members needed sufficient time before the plenary in which to consider the commentaries and sufficient time in the plenary itself in which to discuss them specifically. One solution might be to decrease the time allocated to statements prior to the referral of proposals to the Drafting Committee.

With regard to decision-making, she noted that, in the early years of the Commission, decisions had often been taken by vote. For example, the 1966 draft articles on the law of treaties, which constituted one of the Commission's most widely celebrated achievements, had been adopted by vote. However, since the 1970s, it had relied largely on consensus and had only exceptionally resorted to voting. The most recent example was the 2017 vote on draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction.

The Commission's outputs were not binding *per se*. Their influence could be attributed to a certain "perceived authority" that was due in part to the Commission's consistent adherence to methodology and in part to the fact that its decisions reflected the common understanding of experts representing the majority of the world's legal systems. That common understanding was especially important when it came to identifying existing rules. In 1996, the Commission had recommended that, while it should make every effort to achieve consensus, a vote might have to be taken, perhaps after a "cooling-off" period. She

agreed with the Commission that, if a disagreement persisted after such a cooling-off period, a vote might be a better indication of the Commission's view than a "false consensus".

In conclusion, the Commission's working methods should be expanded and enhanced. The Commission's seventieth anniversary came at a challenging time for international law, and it was possible that the role of the Commission itself might be called into question. The quality of the Commission's outputs, which reflected the common understanding of experts, should make it possible for States and international courts and tribunals to continue to rely on its work. Furthermore, that quality would enable the Commission to fulfil a real and long-term vision: to convince States to continue to use international law as a means of regulating their international affairs.

Mr. Kamto (University of Yaoundé II), panellist, said that the matter of the Commission's working methods had long been an area of concern. In recent decades, the General Assembly had repeatedly emphasized that the Commission should reconsider the way in which it selected topics and the methods and procedures that it used to conduct its work. On the occasion of the Commission's seventieth anniversary, it was worth revisiting a number of unresolved questions in that regard.

Draft articles were the only product of the Commission's work envisaged in article 20 of its Statute, but new types of product, such as draft guidelines, draft conclusions and the reports of study groups, had since been introduced. The Commission would benefit from clarifying the distinction between those various products and adapting its working methods to whichever of them it sought to obtain from its work on a given topic. To that end, the product sought should be selected at an early stage in the process, ideally as part of the discussion of the topic in the Working Group on the Long-term Programme of Work and in any case no later than in the special rapporteur's preliminary or first report. The product that the Commission sought to obtain from its work on a given topic should be discussed in the plenary, such that the Sixth Committee was in a position to approve the Commission's choice of a given topic and the expected outcome of its work on that topic at the same time.

The distinctions between the various products of the Commission's work had given rise to divergent views among its members and in the Sixth Committee. While the reports of the Commission's study groups clearly belonged to a different kind of exercise, one that was closer to academic research than to the progressive development and codification of international law, the specificity of its draft guidelines and draft conclusions was more difficult to isolate.

From a theoretical perspective, the distinction between draft guidelines and draft conclusions was unclear. It was tempting to presume that, as they were not draft articles, draft guidelines and draft conclusions were both intended to offer guidance to States. However, if that was the case, why were two different terms used to describe them? Was there a difference in the respective levels of authority that draft guidelines and draft conclusions enjoyed?

From a methodological perspective, the same working methods were employed to produce draft guidelines and draft conclusions. Regardless of whether draft guidelines or draft conclusions were the expected product of the Commission's work on a particular topic, the special rapporteur for that topic was required to produce successive reports in accordance with the same requirements of quality and with the same regard to treaties, State practice and international jurisprudence. However, the Commission had yet to establish precise and objective criteria for determining whether draft guidelines or draft conclusions should be the product of its work on a given topic. That ambiguity created the impression that there existed a hierarchy of importance among topics. For that reason, the Commission should clarify the situation.

From a legal perspective, it was difficult to distinguish between draft guidelines and draft conclusions in terms of their respective levels of authority. Did draft guidelines constitute mere legal advice to be taken into account at the discretion of States? The Commission had discussed that question in the context of its work on the draft guidelines constituting the Guide to Practice on Reservations to Treaties, but it had not been resolved.

In theoretical terms, experience seemed to suggest that draft articles differed from draft guidelines and draft conclusions in that they were the consummate expression of the current state of international law on a given topic. They would include, on the one hand, a crystallization of the rules of customary international law through codification and, on the other, the rules that the Commission considered to be emerging. The Commission thus identified law, specifically customary international law, and, owing to the power that it had to enunciate rules, was also a quasi-legislator. Although it had not been made explicit that draft guidelines and draft conclusions were the products of a different exercise, member States and users of the Commission's work perceived them as such.

One possible distinction was that draft articles were an expression of *lex lata*, whereas draft guidelines and draft conclusions were related to *lex ferenda*. Although that distinction was not well founded, as draft articles also contained *lex ferenda* as part of the progressive development of international law, the term "draft articles" implied a kind of quasi-treaty whose provisions might be binding on States. The fact that international and even national courts referred to the draft articles of the Commission tended to give States the impression that they had a special or *ad hoc* legal status. In the Sixth Committee, States had on occasion expressed serious reservations regarding the Commission's draft articles, but they tended to be more comfortable with its draft guidelines and draft conclusions. That fact doubtless explained the recent trend in the Commission in favour of the production of draft guidelines and draft conclusions. When States wanted to prevent the formulation of international rules on a topic, they demanded that, if the topic was to be considered at all, the outcome of the Commission's work on it should take the form of guidelines, guiding principles or general principles.

The diversity of terms used to describe the products of the Commission's work could be confusing. Judges might not know how to determine the scope of provisions that were intended merely to clarify a particular legal question. Although it might be thought that draft guidelines were more prescriptive than draft conclusions, the use of the term "guidelines" nevertheless implied that their purpose was merely to guide the legal practice of States.

One possible interpretation was that the reports of the Commission's study groups, draft conclusions and even draft guidelines constituted teachings of the most highly qualified publicists within the meaning of article 38 (1) (d) of the Statute of the International Court of Justice. However, the Commission's draft articles could not be placed into that category; they were more than teachings, as, although they were *lex ferenda* from the formal point of view, at the substantive level, they comprised *lex lata* rules as declaratory of customary law. Moreover, regardless of whether the rules contained in the Commission's draft articles were *lex lata* or *lex ferenda*, they enjoyed a high level of authority that was in no way comparable to the teachings of publicists because the Commission's power to enunciate or formulate the law of the community of States was exercised through the General Assembly, of which it was a subsidiary body. It was doubtless for those reasons that various international courts and tribunals, particularly the International Court of Justice, relied on the Commission's work to support their decisions. However, it was not clear that the Court would be able to rely on the Commission's draft guidelines and draft conclusions with the same confidence with which it relied on its draft articles.

He wished to end his statement by noting the important role of the Commission's special rapporteurs and the valuable support that they received from the Codification Division of the Office of Legal Affairs of the Secretariat. The support of the Codification Division was critical to the timely preparation of commentaries. Lastly, he would encourage Commission members from developing countries to play a more prominent role in the Drafting Committee, as it was in the Drafting Committee that the Commission's draft provisions acquired their final form.

Mr. Murase (International Law Commission), panellist, said that he was concerned about the use of the term "conclusions" to describe the final products of the Commission's work. While that term was generally accepted by the Commission and the Sixth Committee, outside of that context it was used to refer to an internal understanding of a group that had conducted a study; the Commission, however, was a normative organ which produced

documents with certain "external effects of normativity". Its final products should be draft articles, as provided for in article 20 of its Statute, with draft guidelines or model rules being possible alternatives. The term "conclusions" should be used only to describe the products of the work of study groups.

Some study groups, such as those on the fragmentation of international law and the most-favoured nation clause, had produced excellent outcomes, but their reports were not translated into other United Nations languages and were given only limited circulation. Furthermore, attendance at study group meetings was not mandatory, no commentaries on their outcomes were developed and their discussions were given limited coverage in the annual reports of the Commission. He would therefore be in favour of special rapporteurs being appointed for any new topics proposed.

In respect of decision-making procedures, he considered that, provided it was preceded by sufficient discussion, voting — which was provided for in the rules of procedures of the General Assembly — was not a bad thing and would not damage the Commission's collegiate solidarity. The result of the previous year's vote on draft article 7 on the immunity of State officials from foreign criminal jurisdiction should be respected and the issue should not be returned to during the first reading. He hoped that the Sixth Committee would respect the result of the Commission's work, whether achieved by consensus or by vote. Unfortunately, there was no consensus on the meaning of "consensus"; it did not mean giving veto power to a small number of members, but it was sometimes used to block the views of the majority. Individual responsibility was avoided in decisions by consensus, whereas voting required each member to decide where they stood on a given subject, which was good for an expert body such as the Commission.

The use of informal working groups for drafting commentaries was also an issue that required some discussion. It was often difficult after a few years to recall why a drafting committee had decided on specific language; commentaries should therefore be discussed each year and adopted along with the draft conclusions before the end of each session. Postponing their adoption deprived the Sixth Committee of the opportunity to comment for many years. Furthermore, there was no record of the work of informal working groups, which raised the question of transparency and could make it difficult to trace the *travaux préparatoires*.

The Commission had largely exhausted the traditional topics for its work and had begun to consider "special regimes" of international law, such as human rights law, environmental law and economic law, areas which had developed rapidly without any coordination with other regimes or with general international law. Although Commission members were not experts on those special regimes, the Commission could nevertheless play an important role in addressing the related topics from the viewpoint of general international law and so avoid its fragmentation. Under article 16 (e) of its Statute, it was authorized to "consult with scientific institutions and individual experts" for the purpose of the progressive development of international law and so should seek to have more contact with outside experts to facilitate its work, as it had done when looking at the topic of transboundary aquifers.

Mr. Gajić (Ministry of Foreign Affairs, Serbia), moderator, invited the participants to pose questions to the panellists.

Mr. Rajput (International Law Commission) said he would be interested to hear Mr. Kamto's views on the distinction between *lex lata* and *lex ferenda*. The general perception outside the Commission seemed to be that its entire product was both; however, each provision was different and should be analysed to assess which term applied. While the Commission and the Sixth Committee seemed to agree on that point, the Commission might endeavour to keep academia better informed on the matter.

Mr. Loko (Director of Legal Affairs (retired), Ministry of Foreign Affairs, Benin) said that he would like to hear Mr. Kamto's opinion on whether, given that some institutions were making increasing use of the Commission's commentaries, the idea that a product of the Commission's work was considered to have more authority than the legal opinion of an eminent lawyer meant that a commentary in fact set the doctrinal approach of an eminent lawyer either against or on an equal footing with that of the Commission.

Mr. Hmoud (International Law Commission) said that he would like to know what Ms. Azaria's opinion was on the extent to which the Commission's views were considered authoritative by national courts and the weight accorded to its documents.

Mr. Tomuschat (former member of the International Law Commission) said that experience had shown that special rapporteurs benefited from any support they received from networks and groups that they could consult. It was heartening to see that the International Law Commission had learned from the mistakes of the past, so that special rapporteurs were now able to take the right direction from the outset of their work.

Ms. Gueldich (University of Carthage, Tunis) said that she would like to hear Mr. Murase's opinion on how the Commission could expand its cooperation with, for instance, other international and regional bodies, to take account of economic, sociological and technical data in its work on codification of international law.

Mr. Alabrune (Ministry of Foreign Affairs, France), referring to the Commission's capacity to draw on all sources of legal doctrine and jurisprudence, said that he would welcome a discussion on how special rapporteurs could be helped to make best use of available sources.

Mr. Zhang (participant, International Law Seminar) said that he would like to know to what extent the opinions of Governments, who were the Commission's clients, were taken into account in its decision-making procedure, in light of the statement that its reports had not been directly implemented by Governments. It had also been suggested that the Commission had not adequately addressed new topics. Might that be related to some aspect of its decision-making procedure, such as the consensus rule or procedural delays, and could it be an argument for reform of the procedure?

Ms. Azaria (University College London), panellist, said, in response to Mr. Hmoud's question, that she had found from her comprehensive study that the International Court of Justice, when making pronouncements based exclusively on the Commission's commentaries, gave them the same weight as it did to draft articles. She had not carried out any detailed study of the use of the commentaries by national courts, but the question to consider was whether national judges were aware that the commentaries set the context for their interpretation of the draft provisions adopted by the Commission.

Responding to Mr. Murase's statement, she said she had not intended to suggest that voting was a poor method of decision-making, but rather that there was a need for balance and the formation of consensus as far as possible, without allowing a gridlock to occur. It was important that the method used should accord authority to the output and that all groups, including minorities, should feel that they had benefited from it.

Mr. Kamto (University of Yaoundé II), panellist, replying to Mr. Rajput, said that all the Commission's work on draft articles was *lex ferenda* because it had not been formally adopted by States in the form of conventions. However, some provisions were declaratory and could be considered as codification of customary law, which was binding even if it was not set out in a convention. National courts could thus make use of the Commission's work even where no instrument had been formally adopted. As far as the authority of commentaries was concerned, it was not important that individual members of the Commission had developed them; the important thing was that they had been adopted by the Commission as a whole. As far as he knew, no other body involved in codification was as strict in its methods of work as the Commission. As to how different traditions were taken into account in its work, it should be remembered that the members were elected taking the legal traditions from which they came and the languages they spoke into account. The Commission worked in the service of Member States' Governments and could not engage in politics; it was up to the Governments to decide what to do with the products of its work.

Mr. Murase (International Law Commission), panellist, said that it was important for special rapporteurs to be able to draw on a network of jurists around them and at the international level when working on their reports. The support received from international organizations was also extremely useful. In his work as Special Rapporteur for the topic

"Protection of the atmosphere", he had been able, with their support, to organize dialogue sessions for scientists working in that field and members of the Commission.

Panel 3: The function of the Commission: How much identifying existing law, how much proposing new law?

Ms. Aziz (Attorney-General's Chambers, Singapore), moderator, said that the Charter of the United Nations and the Statute of the International Law Commission mentioned both "the progressive development of international law" and "its codification", for which several procedural steps had originally been specified. However, the two concepts had been defined in article 15 of the Statute only "for convenience" and, by 1996, the Commission had considered that it was difficult, if not impossible, to draw a distinction between them in practice. Nevertheless, that distinction continued to preoccupy international lawyers.

Mr. Chen (Peking University), panellist, said that the idea of codification, which was quite recent, had grown out of the codification activities of the League of Nations and had been institutionalized with the establishment of the Commission in 1947, which had formally introduced the distinction between "progressive development" and "codification". One view of codification had been as the registration of unwritten rules of law, "a scientific and not a political task" that should be entrusted to a group of legal experts. Given that codification was seen as the restatement of existing law, presenting it in the form of a draft treaty was a very narrow interpretation. Another view saw codification more broadly as international legislation, with international conventions as its most prominent form. The distinction imposed many limitations on the work of the Commission, with codification based on State practice and especially on progressive development, its outcome being a normative product.

Many changes had occurred in recent years, firstly with the increasing emphasis on progressive development, when the Commission openly recognized the absence of any norms or rules of customary international law, as, for instance, in its work on the exclusion of aliens or on the articles on the responsibility of international organizations. In the case of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the commentary recognized that the principles were intended to contribute to the process of development of international law in the field; that demonstrated that the Commission now felt more at ease with progressive development than with codification.

The second development had been the increasing formalization of principles and abstract rules, with some of the Commission's projects presenting a very general description of a subject rather than setting out specific rights and obligations. There had also been a change in the understanding of the underlying philosophy of codification. Originally, it had emerged in response to the problem of achieving international peace, based on the idea that disputes should be adjudicated by international adjudicatory bodies. In a rule-based notion of international law, rules were considered to be objective and their meanings ascertainable. All international relations were subject to the rule of law. However, codification was also a State-centred approach, with a strong commitment to legal formalism. At the same time, there had been a rise in "soft law", which was sometimes difficult to distinguish from hard law. Given that the latter was developed for the purpose of adjudication, it was clear that there had been a movement beyond the traditional understanding of international law.

The third aspect was the changing form of the Commission's products. It was widely considered that codification, culminating in an international convention, had become the exception rather than the rule in its work. Increasingly, the products of its work had become more flexible and included model rules, draft statutes, guiding or draft principles and conclusions. That raised the question of their authority and legitimacy and of whether they were desirable or appropriate. It also begged the question of whether the adoption or endorsement of such documents by the General Assembly gave them normative force. Most of the Commission's work now concerned secondary rules; furthermore, in formulating conceptual and normative frameworks, it had identified paradigmatic and epistemic constraints, which could also be interpreted as an exercise in international legislation. As

had been noted by Judge Keith, of the International Court of Justice, the work of the Commission had played a structural role in the international legal process and strongly influenced the intellectual framework in which international legal problems were addressed, solved and answered.

The Commission's legitimacy had thus grown considerably over recent years, based on the consent of States during the drafting of documents and on the expertise of the Commission members in matters of public international law. It was further strengthened by the references made to its work by other international bodies, including the International Court of Justice. It might thus be asked whether the Commission could be an autonomous lawmaker. It had contributed substantively to the development of hard law in the form of conventions and the restatement of customary international law. It had made a significant contribution to the growing body of documents known as soft law. And the epistemic and paradigmatic effect of the Commission's work had given it legitimacy and acceptance among States. Clearly, therefore, there was much room for autonomous action by the Commission, although it could not be fully autonomous in performing its fundamental role in the codification and development of international law.

Ms. Ziemele (Riga Graduate School of Law), panellist, said that, while the changing landscape of international law made it difficult to draw a distinction between progressive development and codification, there were clearly areas of law where doing so was important. In adapting to that changing landscape, the Commission could turn to several mechanisms, particularly informal ones, to help to preserve its legitimacy and authority.

The international legal system was composed of a growing plurality of actors and so-called "constitutional sites" active at the international, regional and national levels. The Commission's engagement with national courts, including constitutional courts, was vital and had increased dramatically over the previous 20 years. Steps had to be taken to achieve harmony among competing legal sites. Indeed, the only way forward was through mutual respect and recognition, and better engagement between the Commission and those sites. To that end, the Commission needed to have the capacity to survey normative claims made by a variety of actors, not least regional, supranational and constitutional courts. With that came a need for an effective methodology to distinguish between proper normative claims and mere developments of practice. Efforts by the Commission to engage with other actors would serve to democratize and lend greater transparency to its work, and enhance the legitimacy of its work on codification.

The importance of differentiating between progressive development and codification was illustrated by two cases brought before the European Court of Human Rights. In *Al-Adsani v. the United Kingdom*, the Court had delivered a judgment in which it had made very little use of the Commission's existing work in the field of State immunity. However, in *Jones and Others v. the United Kingdom*, the Court had engaged extensively with the Commission, and large parts of its judgment had been devoted to examining the Commission's position on State immunity and the immunity of State officials from foreign criminal jurisdiction. A major reason why the Court had concluded that the United Kingdom had not breached the European Convention on Human Rights had been that, when the Commission had been given an opportunity to revise its draft articles on jurisdictional immunities of States and their property in order to incorporate an exception to sovereign immunity in cases of torture, it had chosen not to do so. The Court had argued that, while it was possible to identify trends and emerging practices, it could not be said with certainty that States had an obligation to provide for an exception. The Court had added that it could not exclude rapid developments in that regard, but that, ultimately, it was not its task to anticipate any such developments. It was clear, then, that other actors responsible for adjudicating on the rights of individuals were keen to know the Commission's positions on various topics and the reasoning behind them.

To conclude, it was crucial for the Commission to develop networks and enter into dialogues with scholars and regional and constitutional courts, among other actors. In the twenty-first century, informal dialogues and working meetings had become a fundamental means of making progress. The Commission should harness the possibilities offered by the digital era and engage fully with the plurality of actors in the international legal system in

order to, *inter alia*, achieve a better understanding of the distinction between codification and progressive development.

Mr. Murphy (International Law Commission), panellist, said that the Statute of the International Law Commission set out particular processes for engaging in either codification or progressive development of the law, but that the Commission itself had never followed those processes. Instead, the Commission had always viewed codification and progressive development of the law as being intertwined and had never categorized a topic as belonging to one or the other. Although the Commission had a general sense of what each approach entailed, precise definitions had proved elusive.

There were a number of reasons that might push the Commission towards codification for any given aspect of its work. First, there was a deep desire within the Commission for its work to be accepted by States, scholars and other actors. Whenever the Commission pursued progressive development, there was a greater chance of actors voicing their disagreement. Secondly, there was often a desire within the Commission to have influence in a particular field of international law even when the final product of its project was not a treaty. The Commission was going through a phase in which its topics resulted in fewer treaty instruments, with "draft articles" being developed for only three of the nine topics on its current programme of work. When the final product was not envisaged to be a treaty, there was an impulse to develop it as codification of the law, since it would not receive the blessing of States in the same way as would a treaty. Thirdly, many of the Commission's members believed that it was not a law-making body and should thus focus most of its attention on codification.

Yet there were also reasons that might push the Commission towards pursuing progressive development with respect to some or most of its work on a project. First, there was a desire to build a better world. To the extent that codification merely crystallized existing practice, precedent and doctrine, it might be felt that the Commission could do better by trying to improve on the status quo. Secondly, true codification was a complex and difficult task that involved uncovering, translating and understanding the practice and *opinio juris* of 193 States. Advances in technology had facilitated that task to a certain extent, but it had also opened the door to an extraordinary amount of information that required much time to analyse properly. If the Commission were to take the laudable step of strengthening its engagement with non-State actors, the task was harder still. As the Special Rapporteur for the topic "Crimes against humanity", he had participated in workshops around the world, yet his efforts felt like a drop in the ocean as compared to what might be done in that regard. Thirdly, even if the Commission did have a perfect understanding of all relevant treaties, State practice, jurisprudence and writings, the threshold for satisfying the requirements for codification was very high, as could be seen from the Commission's work on the topic "Identification of customary international law". It was easier, in that sense, to go down the path of progressive development.

A separate issue altogether was whether the Commission was transparent to others as to whether it was engaged in codification or in progressive development, which typically might take the form of indicating clearly in its commentary whether a particular provision was codification or not. The reasons pushing the Commission in favour of disclosure were at least threefold. First, it had sometimes helped members to reach agreement on whether an aspect of the Commission's work was codification or progressive development. Secondly, it was useful to other actors who might rely on the Commission's work, such as the European Court of Human Rights, for the Commission to be as clear as possible about what was or was not settled law. Thirdly, being candid helped to preserve the Commission's overall authority and legitimacy.

Yet there were several reasons pushing the Commission away from disclosure as to the nature of its work. First, it was sometimes difficult for members to arrive at consensus about the nature of a particular provision, such that non-disclosure was the Commission's default approach. Secondly, the Commission's mandate allowed it to engage in both codification and progressive development, so it could be argued that both should be generally assumed to be happening and that disclosure in specific instances was therefore unnecessary. Thirdly, some members held the view that the nature of the Commission's work on a given provision was implicit in the commentary that related to that provision. If

the commentary cited copious treaties, State practice and jurisprudence, then codification might be assumed; if not, then implicitly it was progressive development. Fourthly, there was sometimes a concern that, by openly labelling a product as progressive development, the Commission would make it harder for the law to become settled over time. Fifthly, and lastly, some members were of the opinion that the Commission's relationship with the Sixth Committee, where Governments reacted to its work, and the Commission's very composition, with members elected by the General Assembly, lent considerable weight to its legitimacy and thereby lessened the need for, or expectation of, full disclosure.

Mr. Grossman Guiloff (International Law Commission) said that one of the most compelling reasons why the Commission was sometimes hesitant to classify an aspect of its work as codification or progressive development was that there was disagreement among members as to the normative content of customary law. Qualifying a product as progressive development was an effective way of indicating that it was not binding. For that reason, the struggle against colonialism had historically been presented not as progressive development but as the realization of legal principles through the invocation of law.

Mr. Hmoud (International Law Commission) said that Commission members held differing views over what constituted established practice, which made the identification of customary international law a challenging task. The commentaries drafted by the Commission provided a helpful insight into its reasoning.

Ms. Jacobsson (former member of the International Law Commission) said that, during her time on the Commission, she had been surprised at the extent to which its members, particularly the special rapporteurs, analysed and were knowledgeable about regional court cases. She would be interested to know what Ms. Ziemele meant when she said that the Commission should strengthen its engagement with other actors, since the manner in which that was achieved could have implications for the Commission's mandate and the independence of courts.

Mr. Momtaz (former member of the International Law Commission) said that distinguishing between codification and progressive development was a recurring issue. There had been times, in the past, when the Commission had expressed doubts over the meaning and scope of a provision in a draft article. For example, in the commentary to article 41 of the draft articles on responsibility of states for internationally wrongful acts, the Commission had said that paragraph 1, on the duty to cooperate, "may reflect the progressive development of international law". He wondered whether, when the Commission failed to reach consensus on what constituted progressive development, it preferred to maintain an element of doubt.

Ms. Gueldich (University of Carthage, Tunis) said that codification and progressive development were both necessary, as law was constantly evolving and, for as long as there was a human race, there would be new domains in which to legislate. Efforts to consolidate existing law were fraught with difficulty and open to criticism. It was widely agreed that international law was in crisis. When international law was manipulated and politicized by powerful States, it came to be tarnished and degraded, and, rather than the force of law, it was the law of force that prevailed. Consequently, it would be a good idea for the Commission to emphasize or focus on ways to boost the credibility and effectiveness of international law, which was currently the subject of fierce criticism.

Mr. Chen (Peking University), panellist, said that, when the Commission had been established in 1947, a balance had been struck between ensuring the independence of the experts who served as members and seeking the support of States. The combination of independence and State support had helped the Commission to overcome concerns about its legitimacy and remain relevant.

In some relatively new fields of international law, States were particularly keen to know about the status of certain rules, which put pressure on the Commission to take a firm position. Disagreement among States was common and, while the opinions of special rapporteurs were often reflected in their reports, draft articles or other products tended to be generic in nature. Looking to the future, the Commission could take a number of approaches, but it would also have to deal with some limitations.

Ms. Ziemele (Riga Graduate School of Law), panellist, said that there was and always would be disagreement among Commission members as to the nature of law, which was to be expected, given that law was not static. From her own experience working in two courts, it was sometimes not evident where the Commission's disagreements lay. It had to be remembered that not all actors were international lawyers. As a result, for the good of international law, there had to be better communication between legal sites and the Commission, including in the form of dialogues, which had already proved very helpful in giving the Commission a sense of the status of the legal discourse on important issues in different regions.

Mr. Murphy (International Law Commission), panellist, said that it was sometimes easier for the Commission to reach agreement over a particular formulation when the language used did not imply that a rule was settled law. In that sense, favouring language that conveyed a doubt was a valid approach, and one that did not prevent law from becoming settled over time. The international legal system, its rules and institutions were facing unprecedented challenges. In the circumstances, bodies like the Commission had to be careful not to provide opportunities for critics to attack them, for example by avoiding bold claims that they might otherwise wish to make.

The meeting rose at 6.05 p.m.

Provisional

For participants only

3 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3424th meeting
Held at the Palais des Nations, Geneva, on Friday, 6 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Commemoration of the seventieth anniversary of the Commission (agenda item 11) (*continued*)

Panel 4: The changing landscape of international law

The Chair invited Ms. Hammarskjöld to introduce and moderate the panel discussion on the changing landscape of international law.

Ms. Hammarskjöld (Ministry of Foreign Affairs, Sweden), moderator, said that over the previous seven decades the Commission had accomplished much in carrying out its mandate to promote the progressive development of international law and its codification. Faced increasingly with new challenges, the Commission had taken the view that it should not restrict itself to traditional topics but could also consider issues that reflected new developments in international law; the interaction between the Commission and Governments had been important in that respect. The panel discussion would cover not only changes in the field of international law, but also the role of the Commission in responding to or even driving those changes.

Ms. Gueldich (University of Carthage, Tunis), panellist, said that the International Law Commission had played an instrumental role in the codification and progressive development of international law. Since its establishment 70 years previously, a number of global trends had shaped the international order and brought about a new set of challenges, including global inequalities, changes in the economic and geopolitical landscape, climate change and environmental degradation, rapid technological developments and new forms of terrorism and of conflict. While the idea of comprehensive codification had been abandoned, there was virtually no limit to the topics of international law available for study by the Commission.

She recalled that the Commission, in selecting topics for codification, was required, under article 18 of its statute, to submit its recommendations to the General Assembly and also to give priority to requests of the General Assembly to deal with any question. It had been guided in its selection by several criteria: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) the topic should be concrete and feasible for progressive development and codification; and (d) the Commission should not restrict itself to traditional topics, but should also consider those that reflected new developments in international law and pressing concerns of the international community as a whole. In the light of those criteria, she suggested that the Commission should consider such new topics as international security law and the prohibition of the use of force, the humanitarian response to conflicts and disasters, the international responsibility of non-State actors, and new technologies and cybercrime.

The rules governing the use of force, as set out in the Charter of the United Nations, were outdated; more needed to be done to protect people, and new requirements should be established for exceptions, such as the legitimate use of self-defence. The Commission had a role to play in redefining the exceptions permitted in respect of the principle of non-use of force, in order to narrow the interpretation of Chapter VII of the Charter. It must be resolute in addressing the veto power of the five permanent members of the Security Council and its use for political means that resulted in the application of a double standard to rich, powerful States, on the one hand, and poor, weak States, on the other.

International law was sparsely developed in the area of humanitarian response to conflicts and disasters. Specifically with regard to internally displaced persons, no legislation providing for their protection existed aside from the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). The Commission might consider initiating a draft universal convention with a view to protecting internally displaced persons worldwide, especially in light of the trend of intra-State wars and of natural disasters that led to growing numbers of displaced persons.

It was increasingly necessary to highlight the international responsibility of non-State actors, including private military and security companies, a topic that was not covered by any international legislation. A convention that set out international legal obligations and specific recommendations related to the services offered by private military and security companies and that clarified States' obligations when hiring such entities during and after conflicts would be a welcome addition to international law.

The proliferation of information technology had led to a new category of threats known as "cyberthreats". The development of a legal framework for dealing with cybercrime, cyberwar and cyberterrorism was of the utmost importance to tackle such threats. The Commission would have a crucial role in that regard.

Referring to articles 16 to 18 of the Commission's statute, she noted that States, whether individually or collectively, played an important role in each phase of the Commission's work on the progressive development and codification of international law. It was time, however, to increase the participation of developing countries and thus achieve a better balance in the field of international law. Non-governmental organizations (NGOs), which most often were driven by noble values and had no political agenda, should also be more involved.

Throughout its 70 years of existence, the Commission had provided valuable clarification of the rules regarding a number of topics and had contributed to the ever-evolving landscape of international law. Just as the field of international law continued to change, so too should the Commission and its methods of work. She suggested that it should help to disseminate international law more widely, including through research, publications and the translation of ratified instruments. It was also important to provide protection for fragile countries through more equitable and realistic legal mechanisms; to promote a forward-looking, consensual and holistic approach to international law; and to strengthen cooperation between the Commission and, *inter alia*, universities, companies and regional codification mechanisms through joint meetings and workshops. The biggest challenge facing the Commission today was striking the right balance between legal and political imperatives, in order to contribute to a safer and more peaceful and just world.

Mr. Lee (Seoul National University), panellist, said that the world of international law was heavily indebted to the International Law Commission for its work over the past 70 years. While its relevance as an institution for the progressive development of international law and its codification had recently been called into question, it seemed that the Commission had regained its vibrancy and was now dealing with major topics in an efficient manner.

Even at the Commission's inaugural session, there had been differing conceptions of the codification of international law. While some members had expressed the overly ambitious hope that it would be possible to rapidly codify the entirety of international law, others had warned against such attempts, preferring the Commission to focus on just a few topics that would have practical results. According to yet others, who had been highly critical of the traditional concept of codification of international law, a radical transformation had taken place in international relations since the first efforts of the League of Nations to codify international law; that profound change meant that codification of international law should be geared towards questions of primary, contemporary importance and involve the articulation of progressive principles of international law that would contribute to the peaceful coexistence of nations.

According to Shabtai Rosenne, the success of the Commission in the first 25 years of its codification efforts was paradoxically attributable to the international tension brought on by the cold war. According to him, the instruments adopted by the Commission during that period supplied a basic agreed code for their mutual contacts in periods of high tension and suspicion. Whether one agreed with such an assessment or not, the fact remained that the reality — or at least the perception — of heterogeneity in international society affected the conception of codification and, more importantly, the topics to be chosen for codification and the extent and depth of codification.

In that connection, the rise of China and its impact on the international legal order and, by extension, on the Commission's future codification efforts was of especial

importance. Given the relative autonomy of international law *vis-à vis* power constellations during a given period, it could not be said that change in power relations translated automatically into change in the normative arena. The rise of China was nevertheless expected to have a strong impact on the current international legal order as a whole. More significantly, it was clearly not content with the current international legal order and had a strong will to effect a change in at least some aspects of that order.

Introducing the various types of codification efforts of the Commission thus far, he recalled that, because of its impracticability, the conception of codification as the articulation of a complete code of international law, termed "mega-codification", had ultimately not been pursued by the Commission. The Commission, forced to choose a limited number of topics for codification, had taken up a number of subjects that fell within the "general part" of international law, such as the law of treaties, State responsibility and the law of the sea. The Commission's impact had been felt most strongly through its codification efforts in those areas. The 1969 Vienna Convention on the Law of Treaties was a prime example of the Commission engaging in the codification of rules that constituted the very foundation or architecture of international law as a system of law.

The Commission had also chosen some topics that fell under the "special part" of international law. Such "thematic codification" applied to diplomatic relations, consular relations and most-favoured-nation clauses. In addition, the Commission had devoted some work to what could be termed "complementary codification", for instance, when it had expanded the scope of application of the 1969 Vienna Convention on the Law of Treaties by producing the draft articles that had led to the adoption of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Finally, the Commission had also engaged from time to time in "exegetical codification", when it had expanded on or further clarified some of the provisions or issues that had already been regulated by foundational or thematic codification. While there was no hierarchy implied in the taxonomy of codification, it was important that the Commission, in carrying out its main function, namely the promotion of the progressive development of international law and its codification, should strike a balance between the various types of the latter; the Commission's institutional authority and legitimacy depended on it. Moreover, as a subsidiary organ of the United Nations General Assembly, the Commission's clients were mainly Governments; however, it might be time to further expand its horizons beyond inter-State issues to global and transnational issues in order to further strengthen its legitimacy and authority.

Mr. Grossman Guiloff (International Law Commission), panellist, said that international law was constantly undergoing transformation. While some questioned the Commission's ability to continue effectively contributing to the development of international law in the current challenging political landscape, the Commission's role as an independent body was not vulnerable to changing political environments. Over the years, the Commission had successfully represented the overall legal interests of the larger international community, regardless of the political environment. Both previous panellists had highlighted the need for the Commission to reform its approach to the topics it chose to study and to the choice of topics themselves. To maintain its relevance, the Commission should not shy away from topics, such as internally displaced persons, that would have a tremendous impact on States and the international community as a whole. There was value in preserving and developing a space for legal reasoning and discussion based on the language of international law, which sometimes required a long view to measure its impact.

Both of the other panellists had made the valid suggestion that the Commission should modernize the way it approached its work, including by working more closely with civil society, NGOs, academic and technical bodies and experts, and there was certainly benefit to be had from considering the thinking of others. In his view, considering the full spectrum of international actors should not be seen as questioning the relevance of States, but rather as a valuable process, whereby the taking into account of current political realities would enrich decision-making procedures for the benefit of all.

He would have been interested to hear the opinions of his co-panellists on the issue of gender and the Commission's composition and on the current political environment amid the rise of populism and nationalism, and trends towards the decline in the primacy of the

rule of law in international relations. The fact that only seven women members had been elected in the past 70 years was a matter of serious concern, as the Commission had not kept pace with the advancements in gender equality achieved in other areas of international law. As almost every speaker at the commemorative event in New York had stated, it was important to consider the impact of the lack of gender equality on the work of the Commission.

As the President of the International Court of Justice had noted in his address the previous day, the Commission must play a role in responding to threats to the integrity of the multilateral system and continue to promote multilateralism and inclusivity. It had previously seemed that the trends of globalization would strengthen international law, but that optimism now needed to be revised. In recent years, some States, including States that had been instrumental in the construction of international law, had begun to question the current core institutions and norms and the importance of a rule-based order of international relations and had instead returned to different forms of populism and nationalism, seeking to free themselves as much as possible from the normal constraints on the use of power in international relations. At the same time, however, local and city governments, businesses and citizens had adopted innovative new solutions to local and global issues on the basis of the rich international law tradition. While those developments should not be exaggerated, they could not be ignored, as they had the potential to affect international relations. The Italian expression "*chiaroscuro*" — light and dark at the same time — seemed particularly apt to describe the current complex, contradictory times.

It was not possible to solve the problems facing humankind simply through the actions of individual States. As Judge Alvarez had stated in his 1954 dissenting opinion appended to the advisory opinion of the International Court of Justice on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, "the social character of the international law of today is a result of the new regime of interdependence which has emerged and which tends to replace the traditional individualistic regime. Having regard to this social character, what may be called the new international law is particularly concerned with the maintenance of peace and the development of confidence and cooperation between States; it assigns an important place to the general interest and condemns *abus du droit*; it also has a new aim: the well-being of the individual and of society."

In his view, greater attention should be paid to the fact that much of what happened in the world depended on human behaviour, on leadership, on how individuals and institutions, like the Commission, shaped conditions. Referring to a quotation by the writer Gabriel García Marquéz, he said that, in order to promote the change they wished to see, all actors in the field of international law must imagine their contribution to the development of the law and translate it into action.

Ms. Galvão Teles (International Law Commission) said that the selection of new topics was one of the biggest challenges facing the Commission. Of the four criteria used by the Commission to select new topics identified earlier by Ms. Gueldich, she was especially interested in the first — that new topics should reflect the needs of States — and the last — that the Commission should not restrict itself to traditional topics but should also consider those that reflected new developments in international law and the pressing needs of the international community. She would be interested to hear the Panel's views on the role that States could play in the identification of new topics and the possibility of joint reflection between the Commission and States on that subject.

Mr. Mikami (Ministry of Foreign Affairs, Japan) said that it seemed to him that the process by which topics were selected was as important as the topic itself. If the process was conducted properly, it would have a positive impact on the broad debate about the development of international law as a whole. He would be interested to hear Mr. Grossman Guiloff's views, as a member of the Commission, on the process of selecting topics and the proposal that the Commission should enhance the transparency of the selection process. It was often suggested that there should be stronger interaction between the Commission and Governments, and that States should show greater support for the work of the Commission, in the context of the Sixth Committee. Recalling that the late Japanese Ambassador and former Commission member Mr. Yamada had mooted the idea of a joint committee of the

Commission and the Sixth Committee, he said he would welcome the panellists' opinions on the matter.

Mr. Loko (Director of Legal Affairs (retired), Ministry of Foreign Affairs, Benin) said that the Commission might wish to consider holding a seminar on legal strategy together with permanent actors with a view to shaping the future landscape of international law and objectively taking stock of the current situation, keeping in mind that the law must first and foremost be at the service of humankind. Such a move would help avoid the selection of arbitrary topics, facilitate the Commission's work and enhance its legitimacy.

Mr. Grossman Guiloff (International Law Commission) said that the Commission could certainly consider what additional steps could be taken to make the process of selecting new topics more transparent. In his short time as a member of the Commission, he had seen that proposals by States for potential new topics were taken very seriously. However, the Commission was concerned at the lack of response on the part of many States to its presentations and requests, and wondered whether it was simply a question of capacity-building or whether something else was at play. The Commission also attached great importance to its relationship with the Sixth Committee; he agreed that it should consider what institutional mechanisms might be put in place to allow for further interactive dialogue. One of the benefits of the first part of the Commission's session having been held in New York that year was that it had provided the opportunity for side events and informal connections. However, there was a value to having the Commission's meetings in Geneva, where it was able to think and work on topics without being involved in political processes.

Mr. Peter (International Law Commission) said that he agreed with those who had raised the issue of transparency in the selection of topics, but to his mind it was also important to ensure that there was justification for selecting topics. Of late there had been a tendency to select very abstract topics that did not address humanity and were difficult to grasp for the average layperson. The Commission should select more concrete topics that touched on humanity, like protection of persons in the event of disasters and protection of the atmosphere. Referring to the list of topics mentioned by Ms. Gueldich for consideration by the Commission, such as cybercrime, he said that if the intention was to deal with those topics as a matter of urgency, it was important to take into account the many years it took for the Commission to complete its work on any given topic.

Mr. Alabrune (Ministry of Foreign Affairs, France) said that, in his opinion, one of the most important criterion in selecting topics was the capacity of the Commission to address the topic and of States to contribute usefully to the Commission's work. Some topics, such as protection of the atmosphere, were extremely technical and required technical expertise, which could be problematic for States. The Commission should also endeavour in future to reduce the number of topics being dealt with simultaneously because it was extremely difficult for States to provide information, respond to questions and prepare statements for the Sixth Committee on so many topics. Of course, the General Assembly also had a role to play in reducing the number of topics. By prioritizing topics in that way, it would also be possible to complete work on them more quickly.

Mr. Huang (International Law Commission) said that Mr. Lee had mentioned the issue of the rise of China, but of course there were other emerging countries, such as Brazil, Russia, India and South Africa. The issue was how to ensure that when such countries rose they did so peacefully. To that end, in March 2018 the National People's Congress of China had amended the Constitution to include provisions on following a path of peaceful development and working to build a community with a shared future for mankind. The Chinese and Russian Presidents had later issued a joint statement to the effect that their two countries would promote the construction of a community of shared future for humankind. A new legal concept was thus emerging. He would be interested to hear the panellists' views as to whether the Commission might be able to study an emerging concept like the community of shared future for humankind.

Mr. Sharma (Ministry of External Affairs, India) said that the emergence of the notions of State and sovereignty had necessitated the rules for regulating inter-State relations. Combined with conceptual understandings and scholarly contributions, those rules, which had obviously been influenced by practices between and within States, had laid

the foundations of the international legal regime. Of course, the development of a legal regime could never be a one-time affair, as international law was an ever-evolving process, which required regular studies and reviews of existing laws and the formulation of new laws to meet contemporary requirements. For that reason, world leaders had seen the need to create a permanent body to help the United Nations to formulate international legislation to regulate world affairs and ensure the settlement of international disputes through legal means. One of the founding members of the Commission had been from India, Sir Benegal N. Rau, and since then several Indian members had made important contributions to the Commission's work, including Mr. Sreenivasa Rao and current member Mr. Rajput.

Since its establishment, the Commission had successfully fulfilled its mandate, and international law had expanded in a variety of fields, including treaty law, diplomatic and consular relations, the environment and international crimes. However, international law must continue to evolve to meet emerging contemporary challenges. In closing, he wished the Commission a successful future.

Ms. Gueldich, panellist, said that most of the questions raised centred on one main issue, namely how to orient the Commission's work on the basis of diplomatic, political and legal priorities. To her mind, the Commission should be at the forefront of international legal developments, and its work should be guided by changes in the international context and follow a methodical, strategic approach. An objective stocktaking exercise would be very useful and, as had been suggested, the process must be transparent and inclusive but, above all, realistic. It was important to have a community of principles and values and to refocus the debate on humankind. All the actors in the field of international law — States, international organizations, non-State actors and individuals — would have to make a contribution to the work that lay ahead.

Mr. Lee, panellist, said that Mr. Huang had raised an important point. One of the main tasks of international lawyers and international society as a whole was to adapt international normativity to the changing reality in international relations so it was imperative to develop international law in a peaceful manner. The rise of China and other countries posed a challenge and provided an opportunity. It was important to take advantage of that opportunity to enhance the authority of international law by reaching a more diversified, but at the same time harmonious, conception of international law. The Commission could play a very constructive and instrumental role in that respect, in line with article 8 of its statute.

Mr. Grossman Guiloff, panellist, said that, in his opinion, the relevance of so-called "technical" topics should not be dismissed. The Commission's work on the identification of customary international law or the succession of States, for example, might not seem particularly relevant to a layperson, but it certainly was relevant for legal advisers, law professors and legal practitioners and had major practical implications. Of course, it was also important for the Commission to strike a balance in the topics it considered. Priorities were established by the Working Group on the Long-Term Programme of Work, which to his mind worked well, but of course the Commission was open to new ideas and improvements and concrete proposals concerning new principles for the development of international law. Not to downplay the importance of States, he believed that connections with other institutions were essential. It was also important to learn from the past and to tread carefully, particularly given the new rise in nationalism and the rejection of the rule of law.

Ms. Hammarskjöld, moderator, said that two threads could perhaps be carried over into the next panel discussion: the role of States in relation to the Commission and the issue of gender balance. There was also food for thought on how to continue the discussion on future challenges and the role of the Commission.

Panel 5: The authority and the membership of the Commission in the future

Mr. Momtaz (former member of the International Law Commission), moderator, said that the discussion would focus on the composition of the Commission and its methods of work. Concerning the composition of the Commission, it went without saying that the criteria set out in its statute, namely that the members should be persons of recognized competence in international law and that they should represent the main forms of

civilization and of the principal legal systems of the world, remained as relevant as ever. However, other criteria should also be taken into account, including the representation of different generations of jurists, a balance between practitioners and specialists in international law and, of course, the appropriate representation of women. It was the responsibility of States to ensure that those criteria were met when nominating and electing candidates.

The Commission could play an active role in improving its methods of work, as the statute was sufficiently flexible to allow for initiatives to be taken. Concerning the issue of the selection of topics raised in the previous panel, the criteria established at the end of the 1990s remained perfectly valid. Nevertheless, the Commission should exercise caution when it came to the selection of topics and, to the extent possible and for the sake of its own credibility, should avoid abandoning topics part way through. Regarding enhanced cooperation between the Commission and other bodies, specifically the Sixth Committee, it was important to avoid a monologue and to strive for dialogue. Cooperation between the Commission and the International Court of Justice was also particularly important, as evidenced by the fact that the 2001 articles on responsibility of States for internationally wrongful acts had been taken into account by the Court in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. He hoped that the panellists would touch on those and other issues.

Ms. Trávníčková (University of Economics, Prague), panellist, said that, borrowing from economics terminology, the codification of international law could be described as a service, the provision of which required in-depth specialist knowledge. While the market was not highly competitive, the Commission was one of the main suppliers, and demand came from specialized clients. It was difficult to imagine what the codification of international law might look like without the existence of the Commission: while States had ample negotiating capacity, it was unclear whether they would have chosen to use it to consider topics such as the law of treaties and the succession of States.

After the First World War, States had expressed a desire for international treaties that the League of Nations had not been fully able to satisfy. The Commission, in its role as a supplier of international law codification services, had drafted several international treaties that had met with great success in terms of the number of States that had ratified them. In later years, relations in the international community had become more constructive, but the need for a specialized professional codification body had remained, albeit in a market that had begun to change as the demand for international treaties weakened. As a result, the Commission had developed its methods of work and adopted a new approach to international law topics which, while of great importance, were not suitable for systematization in an international convention, such as *jus cogens* and customary law. States could not address such topics themselves, since they were bound by the foreign policies of their own Governments and were unable to dedicate time to the study of the historical and theoretical aspects of a given problem.

The Commission's position in the marketplace for the codification of international law was unique for three reasons: its authority, its composition and its capacity. First, the Commission enjoyed both formal authority — as a result of the way in which it had been created and its position in the United Nations system — and professional authority, which it had earned rather than been accorded. Second, in accordance with its statute, the Commission's members represented the main civilizations and principal legal systems of the world, with a specified number of seats allocated to each of the regional groups. Although there was a noticeable lack of women among the Commission's members, amending the statute to include a quota for women would not be helpful, given that candidates were nominated by States and elected by the General Assembly. Ultimately, knowledge of international law and experience, rather than gender should be the foremost criteria for membership. Lastly, the Commission was unique in its capacity to deal with international affairs and in its wide-ranging freedom to take up any topic pertaining to public or private international law.

As to the possibilities and pitfalls for the future of the Commission, it was likely that the codification market would evolve in terms of both demand and supply and the market environment itself. On the demand side, it was likely that the aggregate demand for

codification would weaken. States, as clients, examined each of the Commission's products carefully before accepting or rejecting them; they could also choose to meet their needs themselves by concluding treaties through summits or other meetings. On the supply side, the Commission continued to hold a unique position: other suppliers could offer only highly specialized products in spheres such as human rights law, humanitarian law and international trade law. New actors, such as regional and national courts, were emerging onto the market; however, their role was ambiguous: neither buyers nor sellers, they used the Commission's final outcomes, while at the same time influencing the shape of the Commission's future products.

Ms. Pinto (University of Buenos Aires), panellist, said that the main ideas that had existed at the time when the need for an international law commission had been identified remained in force at the current time. The legal and political world order created in the aftermath of the Second World War, which had envisaged an increase in the number of States and a growth in the number of issues of common concern to States, had led to the establishment of a multilateral arena where such issues could be addressed. Such a system required clear and universal rules. It had been the role of the Commission in its early years to create, in the words of Thomas Franck and Mohamed ElBaradei, the "essential building blocks in the development of the post-war international legal system", thereby laying the foundation stone of international law which continued to exist in the twenty-first century.

Comments regarding the composition of the Commission could be applied to the United Nations as a whole, since outcomes in that forum were shaped by the instructions delegates received from their Governments. The majority of the Commission's members had served in the diplomatic service or in the legal system of their own States and were therefore accustomed to approaching issues from a semi-official or government perspective. Some members had an academic background, but few legal practitioners were elected to the Commission. It would perhaps be important to consider what proportion of the Commission's membership should be made up of practitioners.

Most members of the Commission had been and continued to be men. When the first two women, Paula Escarameia and Xue Hanqin, had been elected to the Commission, they had constituted less than 6 per cent of the membership. In 2018, the Commission had four female members, raising the proportion of women to less than 12 per cent. Women brought new and different perspectives to the Commission's work; moreover, they now comprised 60 per cent of law graduates globally and tended to achieve higher grades than their male counterparts.

Turning to generational diversity, while it was true that younger people inevitably had less experience in the field of international law, they could also bring a different focus to the Commission. Having been born into a more technological world, they were more likely to be at ease with harnessing online resources.

The representation of regional groups in the Commission mirrored that seen in the United Nations system as a whole, with the African Group and the Group of Western European and other States having eight members each, the Asia-Pacific Group and the Group of Countries of Latin America and the Caribbean having seven each, and the Eastern European Group having four members. However, the list of special rapporteurs appointed by the Commission since its inception told a different story: 31 of the 60 had been from the Group of Western European and other States, with 9 from the Eastern European Group, 8 from the Group of Countries of Latin America and the Caribbean, 7 from the African Group and 5 from the Asia-Pacific Group. It was perhaps time for the Commission to consider a more balanced distribution of the role of special rapporteur, since the major topics that it had taken up in the past had been dealt with mostly by white men from the common law tradition of the North. The Commission could establish a policy of explaining to States that it would be helpful for them to put forward candidates with experience of other legal systems, since those systems were accustomed to coexisting with larger systems and adapting to contextual changes. In that way, the Commission could enhance its legitimacy without diminishing the quality of its output.

In addition to treaties and draft articles, the Commission had also at times produced hybrid texts, such as the Guide to Practice on Reservations to Treaties. Two further treaties

would soon be forthcoming, on the protection of persons in the event of disasters and on crimes against humanity. Its soft and hard outputs had been replicated throughout the legal and political worlds and had been invoked by the International Court of Justice and national courts. According to one legal expert, the output of the Commission was a useful resource with which to fill a vacuum in decisions in arbitration proceedings.

The Commission could perhaps look at finding ways to enhance collaboration with States to ensure sustainable dialogue. While much of the Commission's legitimacy came from its technical competence, which did not necessarily lend itself to participatory working methods, efforts could perhaps be made to expand access for stakeholders, particularly in environmental topics, where non-governmental organizations could provide essential resources.

The Commission was a seal of quality in the global law market. Throughout its first 70 years, it had adapted to changing contexts; it was vital that the high level of its work should be maintained in order for the Commission to stay relevant going forward.

Mr. Tladi (International Law Commission), panellist, said that the two rich and well researched papers that had been presented had addressed the interrelationship between the authority and the membership of the Commission in very different ways.

Ms. Trávníčková's paper had adopted a pedagogical approach, showing how the Commission could be used as a lens through which to view the past and future evolution of international law. Using the metaphor of international law as a marketplace, the paper had presented a mostly positive picture, identifying the selection of topics as the key challenge for the future. The paper had endorsed the formal and professional authority and the representativity of the Commission, while noting that responsibility for the small number of female members lay primarily with States and their delegates in the General Assembly. In his own experience, diversity was valuable in itself and had a positive effect on the work of the Commission.

Ms. Pinto's paper, which had adopted a statistical analytical approach to assessing the relationship between the Commission's authority and its membership, had taken a less sympathetic view and arrived at a different conclusion. It had lamented, or had appeared to lament, the lack of practitioners within the Commission and made strong criticism of the absence of gender and generational representation, as well as offering a stark picture of the historical distribution of special rapporteurs. While the numbers did not look good at first glance, it should be taken as a positive sign that much of the progress that had been made had occurred in the last two decades.

The two very different approaches adopted in the papers were a reminder that diverse perspectives and views should be embraced.

Mr. Momtaz (former member of the International Law Commission), moderator, invited comments and questions from the floor.

Mr. Hassouna (International Law Commission) said that it was unfortunate that members were elected to the Commission as a result of political considerations rather than solely on the basis of their qualifications and knowledge of international law. The General Assembly was a political body in which vote trading was sometimes known to occur.

While it was important to maintain the close relationship between the Commission and the Sixth Committee, it could be helpful for the Committee to play a more active role in shaping the final form of the Commission's output, whether as a resolution, a convention or in another form. Given that the Commission sometimes hesitated to put forward certain topics that could prove controversial, it could be useful for the Committee itself to propose topics.

In the area of representation, there was room for the African and Asia-Pacific Groups to play a larger role within the Sixth Committee. There was an important role to play in that regard for the Asian-African Legal Consultative Organization, which could seek to coordinate the positions of States belonging to those groups, with a view to ensuring that international law was perceived as being more universal in nature rather than simply a European product.

Mr. Reinisch (International Law Commission) said that he was intrigued by the idea of the codification services market as an oligopoly dominated by the Commission. It would be interesting to consider which entities were the Commission's main competitors.

The Chair said that, while the commemorative events marking the seventieth anniversary of the International Law Commission were drawing to a close, the Commission's work for 2018 had not yet ended. Its members would surely be inspired and reinvigorated by what they had heard during the commemorative events, and would continue their dialogue with the Sixth Committee later in the year when it considered the Commission's annual report.

The panel members at the commemorative events had brought a richness and diversity to the debates that had taken place. On the basis of the events held in New York and Geneva, the Commission and its Secretariat intended to produce a publication taking stock of the 70 years of the Commission's existence and looking towards the future of the Commission and of the international legal order. It was hoped that the publication would become a reference point for future discussions.

The Commission was grateful to all those who had taken the floor during the events. The participants had underscored the continued relevance of international law and the crucial role of the Commission in the progressive development of international law and its codification, while also urging the Commission to make the necessary structural changes that would ensure that international law was fairer and more inclusive. The Commission appreciated the support of its own Secretariat, as well as that provided by the Secretariat of the United Nations and the Codification Division of the Office of Legal Affairs.

The meeting rose at 1 p.m.

Provisional

For participants only

2 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3425th meeting
Held at the Palais des Nations, Geneva, on Monday, 9 July 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

Mr. Tladi (Special Rapporteur), summing up the debate on his third report, said that he wished first to address the concern about methods of work expressed by Mr. Nolte and shared by Mr. Rajput, Mr. Grossman Guiloff and Mr. Murase. The non-production of commentaries had nothing to do with lack of effort on his part, as Mr. Rajput's statement had seemed to intimate. He agreed with everything that Mr. Hmoud had said, but wished to point out that the particular method of work for the topic had been proposed during his summing up of the debate on his first report as a compromise in response to concerns expressed by Mr. Nolte, Mr. Murphy, Sir Michael Wood and others, who had queried the suggestion in that report that the Commission should pursue a fluid approach, adopting some conclusions but tweaking them as work progressed. The current method of work would not have been adopted but for the specific concerns expressed. He noted that when the compromise proposal had been made, Mr. Nolte had not expressed any reservation.

The topic had always been considered in the second part of the Commission's annual session. In no case would it have been possible, in the time remaining after finalization in the Drafting Committee, to prepare commentaries, submit them for editing and translation and have them ready for adoption by the Commission. To do so the following year would only prove confusing for States. If, in 2019, the topic was considered in the first part of the session, a full set of commentaries would be produced for consideration by the Commission.

On the whole, with some strongly worded exceptions, members of the Commission had been supportive of his approach and the draft conclusions proposed. He welcomed the proposal by Mr. Ouazzani Chahdi to include a bibliography. On the use of terms, he agreed with the need for consistency, as highlighted by various members. Mr. Vázquez-Bermúdez and Sir Michael Wood had questioned the use of the terms "effects" and "consequences"; he was happy to opt for the former. He also agreed with those members who had said that the word "void" was more appropriate than "invalid" in draft conclusion 11.

Many members had stressed the importance of the topic. Ms. Escobar Hernández had referred to the effects that norms of *jus cogens* could have on the legal system. Some members, in particular Mr. Peter, had emphasized the immense power of the concept as a tool for social change, while others, including Sir Michael Wood, had stressed that it might pose a serious risk if not accompanied by appropriate and responsible safeguards.

The Chair, speaking in his capacity as a member of the Commission, had suggested that the Special Rapporteur's report contributed nothing new. While novelty might be appropriate in academia, the topic had been placed on the Commission's programme of work on the clear understanding that the aim was not to develop new rules but to make existing rules more accessible and understandable, *inter alia* to domestic courts, which found themselves having to apply rules of international law, including peremptory norms, more frequently. The Chair had questioned the logic of draft conclusion 15 and asserted that none of the reports explained what made norms of *jus cogens* different from norms of ordinary customary international law. While that was not the purpose of the third report, the second report had made the distinction clear. Draft conclusion 5, adopted on the basis of the second report, had determined the relationship between *jus cogens* and other norms of customary international law, while draft conclusion 4 set out the requirements for *jus cogens*, which differed from those for customary international law in that a norm of *jus cogens* must be recognized and accepted by the international community of States as a whole as a norm from which no derogation was permitted. If that distinction was thought insufficient, Commission members should say so, but it was wrong to assert that the distinction was not evident.

The Chair had also suggested that there was some inconsistency in the report, questioning whether an exception to immunity *ratione materiae* for violations of *jus cogens* norms was needed if such norms took precedence over other norms of customary international law in any event. That statement assumed that there was a direct conflict between immunity rules and the substantive rules of *jus cogens* relating to the prohibition

of "*jus cogens* crimes" — itself a term that Ms. Escobar Hernández and Sir Michael Wood had found dubious. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, however, the International Court of Justice had demolished that assumption, and further justification was therefore required.

Mr. Murase had drawn attention to the need to consider the definition and nature of *jus cogens* from the perspective of State responsibility. That view accounted for much of his argument, including that the draft conclusions were based on confusion. Most members of the Commission, himself included, did not believe that a different definition of *jus cogens* existed for each area of international law.

With regard to the structure of the report, he agreed with Mr. Ruda Santolaria and Mr. Peter that a recap at the end of each of section would have been helpful. He had structured each of his three reports differently in the hope of making them accessible to readers, and he would continue to explore ways to achieve that.

Despite Mr. Zagaynov's strong disagreement with the approach taken in the third report and some of the draft conclusions, the constructive and respectful nature of his criticism was greatly appreciated. He had rightly emphasized the dearth in practice relating to *jus cogens*, which was particularly stark when it came to consequences. Though challenging, the problem was not insurmountable and did not mean that the Commission should pursue a conservative approach, as Mr. Zagaynov had suggested. Whether practice was abundant or sparse, the Commission's role should be to assess it faithfully, together with the other sources it usually relied on, in order to produce the most accurate description of international law possible. As Mr. Saboia, Mr. Hmoud, Mr. Šturma and others had noted, the third report did that. As Special Rapporteur he would not pursue either a conservative or a liberal approach, and nor should the Commission.

The main concern that Mr. Murphy's suggested rearrangement of material sought to address seemed to be that the structure and wording of the draft conclusions underplayed the procedural requirements set out in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties to the point of ignoring them altogether. In his view, however, the placement of draft conclusion 14 was intended to indicate that it covered all the preceding draft conclusions and did not undermine the importance of the procedure it described. Mr. Murphy's suggestion would disturb the cogent logic of the current structure. Similarly, he did not wish to see paragraphs 1 and 2 of draft conclusion 10 separated. Although they covered different mechanisms by which a treaty might become void, the ultimate consequence was the same. Mr. Murphy seemed to be reading too much into the structure of the 1969 Vienna Convention, which dealt with much more than the consequences of peremptory norms. Even if part V of the Convention had been drafted with only *jus cogens* in mind, invalidity could result from both article 53 and article 64. Mr. Murphy's suggestions seemed to relate more to how those consequences were reached than to the consequences themselves. Even those members of the Commission who had echoed some of Mr. Murphy's strong criticism of other aspects of the report had not endorsed his structural proposals. Save for a few minor changes, he would strongly prefer, as Special Rapporteur, not to adopt the elaborate and rather drastic rearrangement proposed.

Various members had referred to the lack of certainty concerning the meaning of "conflict". As Mr. Park had noted, the issue was inextricably linked with the question of procedure and could usefully be addressed in the commentary rather than in the text of the draft conclusions. Ultimately, determining whether there was a conflict could not be based on abstract considerations but would depend on the wording of each treaty and the content of the *jus cogens* norm in question.

Mr. Ouazzani Chahdi had taken exception to the reference in the report to cases before the European Court of Justice involving agreements between the European Union and Morocco. While it was true that what had been at issue in those cases were decisions of the European Council, the judgments and interpretation of the Court had been based on the agreements in question and concerned the validity and interpretation thereof. The judgments were therefore relevant.

Several members had raised the question of why general principles of international law had not been covered. Like Mr. Nolte, he found it hard to imagine general principles of

law that would conflict with norms of *jus cogens*. That said, although the report made it plain that the same situation pertained for treaties, resolutions of international organizations and customary international law, the draft conclusions made provision for other rules. He therefore agreed with the majority who had taken the view that general principles should not be excluded.

Most members had agreed that draft conclusion 10 was based on the 1969 Vienna Convention. Mr. Park had provided an interesting and useful comparison between the texts of several of the draft conclusions, including paragraphs 1 and 2 of draft conclusion 10, and the Convention, stating that they need not be subject to further debate. Mr. Šturma had called the provisions of draft conclusion 10 appropriate because they flowed from the relevant articles of the Convention. Mr. Nolte, more conservatively, had said that draft article 10 was a good point of departure.

Members had noted that paragraph 3 of draft conclusion 10, concerning interpretation, was different, as it did not appear in the 1969 Vienna Convention. Nonetheless, most members had agreed with its content. According to Mr. Šturma, it would allow most issues relating to *jus cogens* to be resolved. Mr. Rajput had agreed with the rationale behind the text but had concerns about the drafting, although the precise nature of his concerns remained unclear. The suggestion of employing a double negative might make the text cumbersome, but could be discussed by the Drafting Committee. He agreed with the view expressed by many members that paragraph 3 should also apply to the other sources of international law. His preference would be a single draft conclusion applicable to all the sources.

While Mr. Saboia had not expressed opposition to paragraph 3 of draft conclusion 10, he had cautioned that, if stretched too much, it could lead to unforeseen results, and that the Commission should not be seen as undermining the peremptory nature of *jus cogens*. While supportive of the paragraph, Ms. Lehto had warned against allowing it to be used to "remove the teeth" of article 53 of the 1969 Vienna Convention. A similar cautionary note had been sounded by Mr. Park, who had noted that such an approach could open the door to misuse. He had suggested that treaties in conflict with *jus cogens* would never be nullified but would instead be interpreted so as to be consistent with *jus cogens* norms, which, according to both Mr. Park and Mr. Saboia, was not a good thing. In their view, the basis for the consistent interpretation rule should not be, as suggested in the report, the principle of *pacta sunt servanda*. Mr. Park had asserted that, almost by definition, the concept of *jus cogens* denied that principle when the rules emanating from treaties were contrary to higher norms, and that a better basis for draft conclusion 10 (3) was the principle of good faith. Good faith was indeed central to the rule of consistent interpretation; however, that rule did not call for seeking an interpretation that was contrary to the treaty text purely to avoid nullity. Application of the principle occurred in the context of treaty interpretation. That was captured in draft conclusion 10 (3) by the qualification "as far as possible". As Mr. Hassouna had noted, interpreting treaties consistently with *jus cogens* was not a licence to override treaty interpretation rules.

To tackle Mr. Park's point, the commentary would need to be crafted so as to suggest that the provision was based not only on the principle of *pacta sunt servanda* but also on the need for coherence in interpretation; however, the principle of *pacta sunt servanda* was a significant element underpinning both that coherence and the integrationist approach to treaty interpretation. The objective of article 31 (3) (c) of the 1969 Vienna Convention was to avoid conflict between rules of international law where possible, including between rules emanating from the principle of *pacta sunt servanda* and those of superior status. Where it was possible, in good faith, to interpret a treaty by relying on all the means of interpretation, including article 31 (3), and still achieve a result consistent with *jus cogens*, that would always be preferable to invalidating the treaty. That, as explained by Mr. Vázquez-Bermúdez, was the essence of systemic integration in treaty interpretation.

Mr. Park had raised the question of what "as far as possible" meant. As Special Rapporteur, he agreed with Ms. Lehto and Ms. Escobar Hernández that the commentary could explain the meaning of the phrase, i.e. that such an interpretation must not go beyond the bounds of the Vienna rules for interpreting treaties. In addition, Mr. Zagaynov had

expressed scepticism about the beginning of the text, as the current draft seemed to establish a new rule of treaty interpretation. He had suggested that the language in the report itself, which drew expressly on article 31 (3) (c), might better reflect the inseparable organic connection between the proposed provision and other existing elements of the rules of interpretation of international treaties. Were the Drafting Committee to consider such a proposal, it might also address the concerns of Mr. Saboia and Mr. Park. He did not view the current wording as proposing a new rule of interpretation; it simply stated what could be observed in practice, which was an application of the existing rule in article 31 (3) (c) to situations involving *jus cogens*. Nonetheless, Mr. Zagaynov's proposal was acceptable to him.

While paragraphs 1 and 2 of draft conclusion 10 were generally agreeable to members of the Commission, they had attracted some discussion and proposals. Mr. Zagaynov had suggested that a general statement ought to be made that States should not conclude treaties that were in conflict with norms of *jus cogens*. He certainly agreed with that sentiment, but he doubted whether it should be expressed in the text itself. It might be more appropriately placed in the commentaries.

Mr. Nolte had expressed doubts about the second sentence of draft conclusion 10 (1), but had not explained the source of those doubts; Mr. Cissé had said that the sentence was superfluous. Mr. Murphy and many others had expressed the view that it did not belong in draft conclusion 10 as it addressed consequences. However, the idea that a treaty was invalid was just as much a consequence of *jus cogens* as the fact that such a treaty did not create rights or obligations, which was the essence of Mr. Nguyen's comment that the second sentence was a consequence of the first. Nonetheless, he would not object to Mr. Murphy's suggestion that the second sentence be moved to draft conclusion 12. The same arguments applied to the second sentence of draft conclusion 10 (2).

Draft conclusion 11 had been generally well received. Mr. Ruda Santolaria had particularly welcomed the distinction drawn between invalidity *ab initio* and *jus cogens superveniens*. Even Mr. Murphy's statement, which in almost all respects had been critical of the draft conclusions proposed, had referred to draft conclusion 11 as "unobjectionable", apart from the structural concerns already addressed. Although Mr. Zagaynov had not opposed the content of the draft conclusion, he had suggested the use of the word "void" instead of "invaiid". Mr. Nguyen had suggested some textual modifications, including altering "may be" to "is" or "shall be". As drafted, however, the wording was more consistent with Mr. Nguyen's appeal for the absolute prohibition of severability. He was not opposed to the other textual amendments proposed by Mr. Nguyen, if agreement could be reached within the Drafting Committee.

More serious concerns had been raised by Mr. Park, not directly in relation to draft conclusion 11 as such, but to the effect that, if that provision did not clarify how norms of *jus cogens* were formed, it could give rise to disputes as to when a norm of *jus cogens* was established. Many disputes could arise; however, the draft conclusions adopted by the Drafting Committee on the identification of norms of *jus cogens* could be applied to resolve those disputes. A State claiming that a norm of *jus cogens* had emerged before a certain date would need to show that at the said date the said norm met the requirements elaborated by the Drafting Committee in 2017. While the issue raised by Mr. Park was real, tools existed to resolve it.

Mr. Nolte had been in agreement with paragraph 2 of draft conclusion 11, save for subparagraphs (b) and (c). Mr. Cissé, on the other hand, had suggested that subparagraphs (a) and (b) were sufficient and that it was (c) that was obscure and caused confusion. He himself did not agree that subparagraphs (b) and (c) addressed the same issues as (a), as suggested by Mr. Nolte, nor did he agree that (c) was confusing, as stated by Mr. Cissé; more importantly, unless there were specific reasons not to do so, he believed that the Commission should cleave as closely as possible to the provisions of the 1969 Vienna Convention.

Mr. Nolte had raised a more fundamental question concerning paragraph 1 of draft conclusion 11: he was unconvinced that absolute non-severability applied in cases of a treaty conflicting with an existing norm of *jus cogens*. The issue had also been raised by Mr.

Rajput, who had said he was not convinced by the reasoning of the Commission in 1966 and felt that it would be better to use the wording of the 1969 Vienna Convention. In much the same vein, Mr. Hmoud had stated that, while he did not necessarily agree with the Convention on the distinction between cases arising under articles 53 and 64 for the purposes of severability, the distinction should be maintained.

As Special Rapporteur, his initial intention had been to question the content of the non-severability approach taken in the 1969 Vienna Convention, but he had failed to find strong enough reasons to deviate from the clear wording used therein. General Assembly resolution 33/28 A on the Camp David Accords, referred to by Mr. Nolte and referenced in the third report, provided some justification, but more was needed, particularly given Mr. Nolte's statement concerning the lack of practice in relation to immunity. Without a coherent legal basis in State practice, it would be difficult to depart from the provisions of the Convention, despite the concerns expressed by Mr. Rajput and Mr. Hmoud — which he shared — regarding the approach taken by the Commission and States in that instrument.

Mr. Nguyen had raised some interesting questions concerning the establishment of boundaries that were inconsistent with norms of *jus cogens*, but such issues arguably did not concern separability and should not be addressed by invoking a fundamental change of circumstances. *Jus cogens* had its own consequences, independent of *rebus sic stantibus*, and attempting to draw parallels might confuse matters. Mr. Peter had mentioned some of the shortcomings of *rebus sic stantibus*, including that the principle might not apply to *jus cogens*.

Draft conclusion 12 had attracted little comment and enjoyed broad support. As with other draft conclusions, members including Mr. Šturma and Mr. Zagaynov had noted that it generally followed the 1969 Vienna Convention. Mr. Nguyen had proposed some textual amendments that could be considered in the Drafting Committee. Some of them, supported by other members, were that the text should more closely track the wording of the 1969 Vienna Convention, including by reflecting the phrases "bring their mutual relations into conformity with the peremptory norms" and "in as far as possible" to qualify the elimination of consequences. Mr. Ouazzani Chahdi had suggested that draft conclusion 12 should be reworded.

Mr. Murphy, joined by Mr. Huang, had expressed fundamental concerns. He acknowledged that articles 69 and 70 of the 1969 Vienna Convention also applied to treaties that were void on account of conflict with *jus cogens* norms; however, the Commission was concerned with the specific consequences of *jus cogens*, not attempting to rewrite the Convention. As with State responsibility, there might be other consequences, such as the obligation to pay compensation under article 36 of the 2001 articles on the responsibility of States for internationally wrongful acts, but no one was seriously suggesting that because all those duties applied equally to breaches of *jus cogens* norms, they must be included in the draft conclusions, as they were not consequences peculiar to *jus cogens*. Like Mr. Jalloh, he did not, therefore, support the suggestion made by Mr. Murphy and Mr. Huang in that regard.

Draft conclusion 13 had also been generally acceptable to those members who had commented on it. Mr. Ruda Santolaria had rightly drawn attention to the Human Rights Committee's position that reservations contrary to *jus cogens* norms were not compatible with the object and purpose of human rights treaties, in particular the International Covenant on Civil and Political Rights. That point had actually been made in the third report. However, as explained in the report, that was a consequence of the rules on reservations and not of *jus cogens*. The commentary would obviously say something on the subject.

Mr. Nguyen and Mr. Murphy had asked why the phrase "as between the reserving State or organization or other organization" had been omitted. The reason was that the peremptory norm in question continued to apply as a matter of general international law. The commentary could make it clear that it also applied in the relationship between reserving States and/or organizations and other States. He would not be opposed to its inclusion if that was the wish of the Drafting Committee

Mr. Zagaynov, on the other hand, had suggested the inclusion of the qualification set forth in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, that the inclusion of a *jus cogens* norm in a treaty would not invalidate all reservations thereto. That point had already been captured in the report and would be included in the commentary, either to that provision or to draft conclusion 14, rather than in the text itself. Mr. Murphy and Mr. Nolte had also questioned the placement of draft conclusion 13. Its current position might indeed suggest that the procedure in draft conclusion 14 applied equally to the question of reservations. For that reason, it might be better to move draft conclusion 13 to appear after what was currently draft conclusion 14.

Draft conclusion 14 had been supported by most of the members who had participated in the debate, who had been of the opinion that an individual State should not have to decide by itself whether a treaty was invalid. Some of the suggestions for improvement had included broadening its scope to include other amicable procedures, or emphasizing that the International Court of Justice should be the last resort. Two members had been in favour of including all the steps laid down in article 65 of the 1969 Vienna Convention and to that end a proposal had been made to insert a first paragraph in the draft conclusion which would read:

> A State party which invokes the invalidity or a treaty as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify the other parties of its claim. If another party raises an objection, the States parties concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking party may give effect to its claim in relation to any objecting party after invalidity of the treaty has been determined as agreed by them.

While he was not opposed to that proposal, which seemed to have attracted much support, a few substantive points called for comment. First, the last sentence did not come from article 65. It would therefore be interesting to know why and on what basis it had been included. At any rate, it might be useful briefly to discuss that sentence in the Drafting Committee. Secondly, the language of the proposal built on positions concerning other dispute settlement procedures advocated by many members. The Drafting Committee would have to consider whether "negotiations" to resolve disputes turning on whether a rule conflicted with a norm of *jus cogens* subjected the consequences of *jus cogens* to agreements between two or more States. In other words, the issue to ponder was whether it was possible for a treaty that conflicted with a *jus cogens* norm to be spared the consequences of that conflict, if through negotiations the objecting State was granted concessions, whether in relation to the application of the treaty or otherwise. He concurred with Ms. Lehto that it was unnecessary to address procedural issues in the text itself. If the Commission wished to do so, the commentaries could make it plain that any such negotiations did not imply the right of States to contract out of *jus cogens* norms.

Mr. Reinisch and Ms. Escobar Hernández had offered very convincing arguments for excluding arbitration, namely the risk of fragmentation. Mr. Grossman Guiloff had held that the international legal system had ways of dealing with those potential problems. He personally wondered what justification could be given for departing from the 1969 Vienna Convention. Many members had correctly observed that not all States were party to the Convention and that, even among States parties, article 66 was subject to a number of reservations. Mr. Grossman Guiloff took the view that article 66 was probably not customary international law. Hence Mr. Park was right to warn against imposing a procedure that some States had expressly rejected. That concern had been expressed in a different way by Mr. Zagaynov, who doubted that the provision in draft conclusion 14 would apply to States which were not party to the 1969 Vienna Convention. However, draft conclusion 14 did not seek to impose anything on any State. First, the very title of the draft conclusion made it plain that the procedure was only recommended. Secondly, the text of the first paragraph explicitly stated that the recommended procedure was subject to the jurisdictional rules of the International Court of Justice. Finally, paragraph 2 emphasized the necessity of obtaining consent for judicial settlement. Nonetheless he agreed that the range of options for dispute settlement should be expanded.

Mr. Zagaynov had likewise questioned whether the recommended procedure should apply to any party to a dispute involving a potential conflict between a treaty provision and a *jus cogens* norm, or whether it should apply only to the parties to the treaty. His own view was that draft conclusion 14 should not address that matter, because, among other things, it was only a recommendation. Ultimately, in addition to any jurisdictional rules applicable to the International Court of Justice or any other dispute settlement procedure, the question of standing would arise. If a State had standing on a matter, it was unclear why it should be prevented from seeking a resolution of the dispute. For example, if two States entered into an agreement to use force against a third State, it was hard to see why the third State, which was under threat of an armed attack, should be prevented — provided that the jurisdictional requirements were met — from turning to a dispute settlement procedure to secure a determination of whether that agreement violated a *jus cogens* norm. Such action had been taken in two recent cases (*C-104/16 P* and *C-266/16*) heard by the European Court of Justice where the validity of agreements between the European Union and Morocco had been challenged by the Frente Polisario, which was not a party to the agreement.

While Mr. Zagaynov apparently preferred to drop draft conclusion 14, Mr. Murphy seemed to be in favour of strengthening it since, as it stood, it only recommended a procedure that was in fact legally binding for States parties to the 1969 Vienna Convention. He personally failed to see why that was a problem. After all, for States parties to the Convention, the procedure remained legally binding under the Convention and no reasonable international lawyer would ever construe draft conclusion 14 as meaning that States parties to the Convention were no longer bound by the procedures set forth in the Convention to which they were party. The alternative, in other words purporting to make that procedure binding on States not party to the Convention, would be hugely problematic, particularly since the draft conclusions were not binding. He had no problem with clarifying that parties to the Convention remained bound by the procedures set forth therein, although that issue could be addressed in the commentary.

Mr. Cissé, who was not in favour of the second paragraph, had proposed language which seemed to go against the essence of that paragraph and which might lead the Commission into areas where it should not tread. He was personally more inclined to accept the suggestion made by Ms. Galvão Teles, to reformulate the second paragraph as a "without prejudice" clause.

Although most members had agreed with draft conclusion 15, two had taken issue with the language of the first paragraph. What the text meant to signify was that a rule of customary international law would not arise if the content of that potential rule conflicted with *jus cogens* norms. He would not, however, be opposed to wording along the lines of "a general practice accepted as law (*opinio juris*) in conflict with a peremptory norm of general international law (*jus cogens*) does not give rise to a rule of customary international law" or "a customary international law rule does not arise if the practice on which it is based conflicts with a peremptory norm of general international law (*jus cogens*)".

Mr. Zagaynov and Mr. Park had raised questions about the persistent objector doctrine. In the report, it was noted that the answer seemed to be self-evident. A peremptory norm was qualitatively different to a normal rule of customary international law and their consequences were therefore different. One of the qualitative differences in the consequences was that the persistent objector doctrine did not apply to peremptory norms. While Mr. Zagaynov did not seem to gainsay the logic of denying persistent objection in the case of peremptory norms, he considered that it was necessary to link the effect of objection during the formation of customary international law with the non-applicability of persistent objection once a norm had achieved *jus cogens* status.

Mr. Rajput's argument that it was essential to make it plain that the persistent objector doctrine applied until such time as a norm became peremptory seemed to have little to do with the topic, as it was a matter that was clearly covered by the draft conclusions on the identification of customary international law. Sir Michael Wood seemed to question the *lex lata* status of the conclusion regarding persistent objectors, but without stating his reasons; he had also suggested that the report stated that there was no practice in that regard, whereas in fact paragraph 143 cited three cases.

Mr. Murphy had expressed concern about the conceptual issue of the modification of a peremptory norm by a subsequent peremptory norm. Indeed, there was nothing in the draft conclusions as they stood which prevented the possibility of a new *jus cogens* norm conflicting with and replacing a previous one. However, for that to happen, such a norm could not be a normal rule of customary international law; it would have to be accepted and recognized as a norm from which no derogation was permitted. Mr. Nolte's proposal to insert the phrase "not of a *jus cogens* character" might solve the problem. At any rate, that was an issue for the Drafting Committee and it would have to be addressed in the commentary.

Mr. Rajput had been the only member to question the correctness of the substance of the first paragraph of draft conclusion 15, and to contend that a rule of customary international law without peremptory status could arise and apply even if it were inconsistent with a peremptory norm. He had based that astonishing claim on an argument pertaining to humanitarian intervention and the responsibility to protect. In fact, neither of those concepts were exceptions to the prohibition of the use of force, albeit for different reasons. Although the *jus cogens* norms in question were often referred to by the term "prohibition of the use of force", the Commission used the term "prohibition of aggression", which encompassed the primary rule and exceptions thereto. The evolution of a new exception would thus have to be part of that peremptory rule. In other words, it would have to be recognized and accepted by the international community, with the result that a conflict with *jus cogens* would not arise.

There had been little comment on draft conclusion 16. Several members had expressed the view that the term "unilateral acts" should be clarified and limited to unilateral acts of State that were capable of establishing legal obligations. That should be done and the three categories of unilateral acts mentioned by Mr. Murase should likewise be considered in the draft conclusions.

Draft conclusion 17 had been generally supported by the members of the Commission. Mr. Šturma had agreed that peremptory norms did have consequences for binding resolutions of international organizations, including those of the Security Council and he had put forward some wording for consideration by the Drafting Committee. Mr. Vázquez-Bermúdez had been of the opinion that Security Council resolutions were not *per se* sources of law and Ms. Escobar Hernández had thought it wise to consider all instruments with the capacity to produce legal obligations, even if they were not sources of law. Several members had been of the view that other tools for establishing obligations should be included, not just binding resolutions, and that other international organizations should be covered. The various textual proposals made could be considered by the Drafting Committee.

While some members had questioned the need for a specific reference to the Security Council, others had contended that such a reference was appropriate. A very interesting mini-debate had ensued. He had been more inclined to the view that, since the discussion of the effects of *jus cogens* on international organizations' acts tended to take place in the context of debates on Security Council decisions, they deserved special attention on account of the Council's unique powers flowing from Article 103 of the Charter of the United Nations. Mr. Huang's suggestion that procedural requirements were the only test of the legality of the Security Council's decisions was not consonant with Article 24 of the Charter. Moreover, as two other members had noted, it was unclear how the Charter itself could be subjected to *jus cogens*, when an entity established by the Charter was not. In view of Mr. Huang's comments, it was manifestly appropriate to refer explicitly to the Security Council in the text of the draft conclusion. Only three members had opposed draft conclusion 17, one of them on the grounds of lack of practice in support of it. In that connection, he referred that member to paragraphs 153 to 156 of the report. Mr. Rajput's objections were somewhat opaque. He seemed to agree with the principle, but questioned its applicability to specific norms. Clearly as not all the norms which he had mentioned were *jus cogens*, his concerns had no foundation. Lastly, he had no objection to including language on the issue of separability in response to a point raised by two members.

Draft conclusions 18 and 19 had received almost unanimous approval. He had no objection to the language proposed by Ms. Galvão Teles which tracked that of *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. He also agreed with the seven members who had maintained that draft conclusions 18 to 21 should apply not only to States but also to international organizations.

Mr. Rajput had latched on to the desire to insert the word "serious" in draft conclusion 21 and had mistakenly sought to apply it to draft conclusion 18 as well. He had advanced a myriad of reasons for that by linking the case law of the International Court of Justice with the draft articles on State responsibility. Nowhere in those draft articles was it stated that the *erga omnes* obligations stemming from a peremptory norm depended on the seriousness of the breach of that norm. Secondly, and more importantly, Mr. Rajput's assertion was based on a fundamental misunderstanding both of the third report and of the relationship between *erga omnes* obligations and peremptory norms. *Erga omnes* obligations were certainly not the same thing as peremptory norms and, as Mr. Reinisch had pointed out, the third report made that clear. Any reference to paragraph (7) of the commentary to chapter III therefore lacked pertinence. Mr. Rajput seemed to assume that obligations — *erga omnes* or otherwise — stood on their own, whereas they flowed from rules or norms. Hence the two concepts, while not synonymous, were related. Peremptory norms were not *erga omnes* obligations, but they produced *erga omnes* obligations. Mr. Rajput also seemed to claim that the existence of obligations depended on a breach. It did not. A peremptory norm established an *erga omnes* obligation, regardless of whether that peremptory norm had been breached.

Furthermore, Mr. Rajput's quotation of parts of the commentaries to the draft articles was conveniently selective. For example, when quoting paragraph (7) of the commentary to chapter III, he had ignored the passage immediately preceding it which read:

> The examples which [the International Court of Justice] has given of obligations towards the international community as a whole concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention involve obligations to the international community as a whole.

It was equally inaccurate to suggest that the Special Rapporteur, James Crawford, shared his approach. In paragraph 81 (b) of his first report (A/CN.4/490), Crawford observed that:

> Under existing international law, two possible categories are obligations *erga omnes*, and rules of *jus cogens*. Yet, although they consist by definition of norms and principles which are of concern to the international community as a whole, those categories do not correspond in any simple way to the notion of the "most serious breaches". There can be very serious breaches of obligations which are not owed *erga omnes* ... and minor breaches of obligations which are owed *erga omnes*.

With respect to draft conclusion 20 (3), he was unsure whether Mr. Zagaynov's notion of the priority of cooperation mechanisms under collective security measures was correct. While collective security measures were the most likely means of cooperation, that did not signify that they took priority. Furthermore, the report had plainly shown that some cooperative measures which were possible as part of collective security measures could not be undertaken unilaterally or on an *ad hoc* basis. Those nuances could be brought out in the commentary. He was not averse to the proposal to add language from the advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* to the effect that the consequences of non-recognition should not have a negative effect on, or disadvantage, the affected population and, consequently, that acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized. That position had already been expressed in paragraph 100 of the report and he had intended to propose its inclusion in the commentary. However, there was also merit in including it in the text.

Four members had suggested the addition of language on countermeasures. The legality of the latter was highly controversial. For that reason, it might be unwise for the Commission to venture into that terrain. Nevertheless, he was open to any proposal that members might make in the Drafting Committee.

Some members had questioned the advisability of omitting the word "serious" in draft conclusion 21. That omission had not been an oversight. It was true that the Commission should adhere closely to the draft articles on responsibility of States for internationally wrongful acts unless there was good reason to depart from them. In that connection, he asked members to consider Mr. Hmoud's contention that at the time the draft articles on State responsibility were adopted, the Commission did not view the duty to cooperate as *lex lata* but was engaging in a process of progressive development. Since the provision had become *lex lata*, the question arose of whether the Commission should not engage in a process of progressive development by removing the word "serious". By insisting on its inclusion, the Commission would appear to be suggesting that it was lawful for States to recognize or even assist in breaches of *jus cogens* that were not serious. "If a single case of torture were deemed not to be serious, that would imply that one State could assist another State in torturing an individual. If the Commission insisted on retaining the word "serious", the commentary would need expressly to state that in 2018 the Commission took the view that a State was free to recognize or even assist in breaches of *jus cogens* that were not serious. At the same time, the commentary would have to make it clear that some members, including himself, dissented from that view.

Draft conclusions 22 and 23 touched on the most sensitive issues. Most Commission members supported their inclusion. However, some members, namely Mr. Murphy, Sir Michael Wood, Mr. Zagaynov, Mr. Nolte, Mr. Rajput and Mr. Huang, were strongly opposed. Others, such as Mr. Ruda Santolaria, had said that, although they were not opposed to the content of draft conclusions 22 and 23, they believed that those draft conclusions touched an issue that should be dealt with in the context of the topic of immunity of State officials from foreign criminal jurisdiction.

There was one particular criticism with which he had a great deal of sympathy. Mr. Murphy, Mr. Zagaynov, Mr. Nolte and Sir Michael Wood had argued that draft conclusions 22 and 23 differed from the other draft conclusions proposed for the topic in that they did not address methodological questions. Mr. Zagaynov, for example, had correctly observed that draft conclusions 22 and 23 concerned the specific consequences of certain *jus cogens* norms in connection with crimes under international law, such as the prohibition of genocide, rather than *jus cogens* norms in general. Mr. Zagaynov had asked why the consequences of self-determination had not been considered separately. It might equally be asked why the consequences of the use of force, racial discrimination and so forth had not been considered. Mr. Nolte had observed that one focus of the Commission's work on the topic was the methodology used to determine all the rules of *jus cogens* and their consequences and that, if the Commission sought to determine the specific consequences of certain rules of *jus cogens*, such as those on genocide, war crimes or crimes against humanity, it would also need to consider the specific consequences of other rules. Mr. Nolte had also mentioned self-determination as an example.

Those were all good points, and he agreed that they constituted a reason not to include draft conclusions 22 and 23. However, he recalled that explicit reference was made to the issue of immunities in paragraph 17 of the syllabus for the topic. Although Mr. Zagaynov and Mr. Rajput had not been members of the Commission when the syllabus had been discussed, Mr. Murphy, Mr. Nolte, Sir Michael Wood and Mr. Huang had been. The discrepancy between the issue of immunities and the methodological nature of the topic had not been raised. Although Mr. Murphy had actively participated in the Commission's discussion of the syllabus, he had, at that time, not argued against the consideration of the issue of immunities on the grounds that it concerned primary, substantive rules. It was strange that such an argument was being made for the first time and that the consideration of an issue that had been proposed in the syllabus should cause such surprise.

In that connection, he took exception to Mr. Rajput's suggestion that the treatment of the topic was an attempt to capitalize on the divided opinion that had emerged in the Commission in relation to the topic of immunity of State officials from foreign criminal

jurisdiction. The syllabus showed clearly that the issue of immunities had been planned for consideration as part of the topic of peremptory norms of general international law long before 2017. For that reason, its inclusion could not be attributed to any such motives.

Mr. Nolte had been correct to link the proposal to address immunities with the proposal to draft an illustrative list, as they both related more to primary, substantive rules than to the methodological focus of the topic. Members would recall that he had yet to decide what should be proposed as part of such an illustrative list. His indecision stemmed from a recognition of the same distinction between substance and methodology to which a number of Commission members had drawn attention in relation to his third report. From the outset, some States and some Commission members had raised concerns regarding the inclusion of an illustrative list, which had led him to wonder whether such a list should be included at all. However, the same could not be said of immunities. Some Commission members had suggested that the Commission should postpone its consideration of the issue of immunities in the context of the current topic until it had considered exceptions to immunity as part of the topic of immunity of State officials from foreign criminal jurisdiction. But it had never before been suggested that the issue of immunities should not be considered at all. Indeed, it was such a prominent part of the topic of peremptory norms of general international law that, in the 2015 volume of the *Netherlands Yearbook of International Law*, Alexander Orakhelashvili had criticized in some detail the approach that he assumed the Commission would take towards it.

Nevertheless, regardless of the fact that the issue of immunities was included in the syllabus, there was no doubt that a number of Commission members had raised a legitimate substantive concern. Ms. Lehto had quite correctly observed that the decision to consider the issue of immunities reflected a focus on the potential consequences of *jus cogens* that had most often been identified. Mr. Murphy and other Commission members had also argued that the consideration of exceptions to immunity would interfere with the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction. Indeed, Mr. Murphy had suggested that it would make it impossible for the Commission to find a solution in the context of its work on the topic of immunity of State officials from foreign criminal jurisdiction. However, a solution had already been found in the form of the majority vote on draft article 7 on that topic. Other members who had supported the content of draft conclusion 23 had also drawn attention to the need to avoid an overlap with the topic of immunity of State officials from foreign criminal jurisdiction. On that point, he shared Ms. Lehto's view, namely that draft conclusion 23 was a general rule, whereas draft article 7 on immunity of State officials from foreign criminal jurisdiction was a specific rule. It had also been argued that draft conclusion 23 was broader than draft article 7.

Mr. Murphy had said that the treatment of the issue of crimes against humanity as part of the topic of peremptory norms of general international law would have a negative impact on the Commission's work on the topic of crimes against humanity. He had explained that Governments had intimated to him that draft conclusion 23 risked dashing any hope of a convention on crimes against humanity. Regardless of whether the draft conclusion did indeed pose such a risk, the Commission could not make decisions on the basis of private conversations to which it had not been privy. In late 2017, when draft article 7 on immunity of State officials from foreign criminal jurisdiction had been debated in the Sixth Committee, no State had mentioned that the establishment of an immunity exception to crimes against humanity would jeopardize the hopes of a convention on crimes against humanity.

It was also unfair to blame the Commission's work on one topic for the possible failure of its work on another. He hoped that the General Assembly would decide to prepare a convention on crimes against humanity, but, if it did not, it was unlikely that his third report would be to blame, even if the Commission did adopt draft conclusion 23. There might be other reasons, for example the general reluctance of the Sixth Committee to elaborate conventions or its practice of consensus. It was clear, for instance, that many States wished to uphold the articles on responsibility of States for internationally wrongful acts as a treaty, but, owing to the practice of consensus, a minority of States were able to block any move in that direction. In addition, any future decision not to prepare a convention on crimes against humanity might also be attributed to the Commission's

decision not to include all core crimes within the scope of that topic. He had argued from the outset that the topic of crimes against humanity should be expanded, but his had been a lone voice in the Commission. Ms. Escobar Hernández and Mr. Jalloh had subsequently made the same argument, but the Commission had ultimately submitted to the will of the majority.

With regard to the substance of draft conclusions 22 and 23, Mr. Murphy had taken issue with the "novel arguments" advanced in support of draft conclusion 23, which he found "incredible" and "misleading". By "novel arguments", Mr. Murphy was referring to the distinction between criminal and civil proceedings. However, he (Mr. Tladi) had himself made the very same argument in his statement on the fifth report of the Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction. Indeed, his main criticism of that report had been that a distinction of that kind had not been made. Other Commission members had also made that distinction. For that reason, there was nothing novel about those arguments.

Although Mr. Murphy had, in his oral statement, not given the reasons for his characterization of the arguments advanced in support of draft conclusion 23 as "incredible" and "misleading", the footnotes in the written version of his statement gave an indication as to his reasoning. In one footnote, Mr. Murphy had stressed that the relevance of the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* had been made clear in the syllabus for the topic. That was a surprising statement, as, in its judgment on the case, the International Court of Justice had taken the same approach that he had taken in his third report. In paragraph 91 of its judgment, the Court had emphasized that, in reaching its conclusion, it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State had not been in issue in the case. The Court had reiterated the distinction between the immunity of the State from civil proceedings and the immunity of officials from criminal jurisdiction elsewhere in its judgment on the case. The fact that the case had been referred to in the syllabus was frankly irrelevant. The syllabus offered a survey of court decisions and other sources and made no claims regarding the content of the rules. The syllabus set out the topic to be studied and did not itself constitute the study. Moreover, the case concerning *Jurisdictional Immunities of the State* had not simply been discarded, as Mr. Murphy had implied. The very basis of the distinction that Mr. Murphy had described as novel had been derived from that case, among others.

In another footnote, Mr. Murphy had argued that, although practice relating to civil proceedings had been deemed irrelevant in the third report, the Special Rapporteur had nevertheless cited civil cases in support of his position, in particular *Yousuf v. Samantar*, which had been cited in footnotes 316 and 339. However, in footnote 316, *Yousuf v. Samantar* had been cited only as an example of the sources used by commentators who relied on practice relating to civil proceedings in order to reach conclusions regarding immunity from criminal prosecution. In the relevant paragraph in his report, he had concluded that it was practice related to criminal proceedings that had to form the basis of any international law rule relating to exceptions to immunity on account of *jus cogens* crimes. In footnote 339, *Yousuf v. Samantar* had been cited for the same reason as *Jurisdictional Immunities of the State*, namely to support the view that cases relating to civil proceedings should not be used as authorities in relation to exceptions from immunity in the criminal context.

Thus, the parts of Mr. Murphy's statement that addressed the "novel arguments" advanced in the third report were themselves incredible and misleading. It was for that reason, among others, that short reports were preferable: readers often became tired and missed the nuances.

Mr. Nolte had made many substantive comments with which he disagreed. In general, those comments concerned the availability of practice. As Ms. Lehto and Ms. Escobar Hernández had argued in their statements, there was an abundance of practice. The main flaw in Mr. Nolte's statement was that he had assumed, incorrectly, that the report bestowed peremptory status on the effects themselves. It would be extremely surprising if Mr. Nolte was seeking to suggest that the available practice was not sufficient even for an

ordinary rule of customary international law, as the Commission had in the past based important draft conclusions on even less practice. It should be recalled that, as had previously been noted by many Commission members, the persistent objector rule had been included in its draft conclusions on the identification of customary international law on the strength of the *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* case alone.

Mr. Nolte had argued that, as the International Court of Justice had asserted that substantive norms of *jus cogens* and rules on immunity, which were procedural in nature, were sets of rules that addressed different matters, draft conclusion 23 (2) was problematic. However, the paragraphs that Mr. Nolte had cited from the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* were of no relevance to that distinction, which had been made in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. In addition, an entirely separate distinction was made in paragraph 60 of the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, namely a distinction between immunity and criminal responsibility. That second distinction had been captured in the draft articles on crimes against humanity.

Mr. Murphy had ended his statement by suggesting that the Commission's special rapporteurs for other topics should have been consulted prior to the proposal of draft conclusion 23. However, the topics on which the Commission's special rapporteurs worked were not their own, but were those of the Commission as a whole. It was for the Commission to determine whether the special rapporteur for a given topic had made a decision or a recommendation that would negatively affect its work on another topic. In fact, as the Special Rapporteur for the topic of peremptory norms of general international law (*jus cogens*), he would be acting in bad faith if he deprived the Commission of the outcomes of his research on the basis of backroom deals struck with other special rapporteurs.

The report was the only instrument over which the special rapporteur for a given topic should have full control. Special rapporteurs should not be guided by a desire to avoid offending other Commission members or creating divisions within the Commission. In addition, it had never before been claimed that a special rapporteur was required to consult other special rapporteurs. Although it was argued in paragraph 39 of the first report of the Special Rapporteur for the topic of crimes against humanity that the prohibition of such crimes was a *jus cogens* norm, he had never been consulted by Mr. Murphy, who was the Special Rapporteur for that topic. In the fifth report of the Special Rapporteur for the topic of identification of customary international law, Sir Michael Wood, a "without prejudice" clause on the persistent objector had been proposed for *jus cogens* norms. Sir Michael Wood had not discussed the matter with other special rapporteurs, as it was his duty to consider materials and make proposals to the Commission on the basis of those materials.

Some Commission members who strongly supported draft conclusions 22 and 23 had proposed that, although draft conclusion 23 should be referred to the Drafting Committee, it should be left in abeyance until the Commission had completed its work on the topic of immunity of State officials from foreign criminal jurisdiction. He had initially been attracted to that proposal. However, having listened to the debate, and recalling the argument made by a number of Commission members that draft conclusions 22 and 23 were inherently different from the others that had been proposed for the topic, as they addressed substantive, primary rules, such a course of action would merely delay the inevitable.

Mr. Murase, for example, had stated that he could agree with draft conclusions 22 and 23 if the Commission knew what crimes were covered by them. However, he (Mr. Hladi) would be reluctant to limit the list of *jus cogens* crimes to those identified in draft article 7 on the immunity of State officials from foreign criminal jurisdiction. The effect of doing so would be to halt the development of an important area of law. It would be possible to provide an illustrative list of such crimes, but to do so would not be consistent with draft article 7. Some Commission members had made the point that the topic of immunity of State officials from foreign criminal jurisdiction excluded immunities covered under specialized treaty regimes. By extension, such immunities would presumably also be

excluded from the scope of draft conclusions 22 and 23. However, he would be reluctant to suggest that rules relating to *jus cogens* crimes were subject to treaty regimes. He had thus concluded that any such attempt was fraught with difficulty. The problem could not be resolved by referring the draft conclusions to the Drafting Committee and leaving them in abeyance. It might, therefore, be preferable not to address issues relating to such substantive, primary rules as part of the current topic and to justify the non-inclusion of the two draft conclusions on that basis.

There was another reason for not attempting to address issues relating to primary rules. He believed that, for criminal matters, there was an exception to immunity *ratione materiae* under international law for all *jus cogens* crimes. However, he also believed that there was no exception for immunity *ratione personae*. Nevertheless, he was reluctant to include in the draft conclusions a provision recognizing that there was no exception to immunity *ratione personae*. In fact, he believed that there was no exception for the immunity of officials or of the State in civil proceedings for *jus cogens* crimes. It was his impression that, although courts might wish that there was such an exception, they would not make the first step in that direction.

For those reasons, he believed that the Commission should not attempt to address the issue of immunities. In any case, he was of the view that draft conclusions 22 and 23 should be dealt with as a pair. However, it should be borne in mind that the issue of immunities was often discussed, both in academic literature and by the courts, that it had explicitly been stated in the syllabus that it would be considered and that it had been included in the third report. As such, if the Commission remained silent on the matter, its silence would be interpreted as evidence that there were no exceptions to immunity *ratione materiae* for *jus cogens* crimes. For that reason, a "without prejudice" clause might be the most appropriate solution.

On that basis, he proposed that the two draft conclusions should be transmitted to the Drafting Committee on the understanding that they should be redrafted as "without prejudice" clauses. He proposed that the two draft conclusions should be accompanied by a text to the effect that: "The present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)." That text did not include the word "immunity", but it would of course be mentioned in the commentary that immunity was one of those consequences, and he undertook to draft the commentary in a non-prejudicial manner. His proposal was, he believed, an optimal one from a substantive perspective and from the perspective of the internal harmony of the Commission.

He had taken note of Commission members' comments regarding the future programme of work and would consider them carefully in the preparation of his fourth report. He hoped that the Commission would be in a position to refer the proposed draft conclusions to the Drafting Committee.

The Chair said he took it that the Commission wished to refer draft conclusions 10 to 23 to the Drafting Committee, taking into account the comments and suggestions made in the plenary debate, and that, with regard to draft conclusions 22 and 23, the Drafting Committee would work on the basis of the proposal made by the Special Rapporteur at the current meeting.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of peremptory norms of general international law (*jus cogens*) was composed of Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov, together with Mr. Tladi (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 4.55 p.m. to enable the Drafting Committee on peremptory norms of general international law (jus cogens) to meet.

Provisional

For participants only

8 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3426th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 10 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (A/CN.4/720)

Report of the Drafting Committee (A/CN.4/L.876)

The Chair said that it would be recalled that, in 2016, the Commission had considered the report of the Drafting Committee on the topic protection of the environment in relation to armed conflicts and had adopted the texts of draft principles 1, 2, 5, 9, 10, 11, 12 and 13. The commentaries to those draft articles had subsequently been adopted at that session.

At the same session in 2016, the Commission had had before it the third report (A/CN.4/700) of the former Special Rapporteur, Ms. Jacobsson, which had included proposals for further draft principles. The Drafting Committee had subsequently adopted the texts of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, which were set out in document A/CN.4/L.876. As commentaries to those draft articles had not been prepared for that session, the Commission had taken note of the draft principles.

The commentaries to those draft principles had since been drafted by the Special Rapporteur, Ms. Lehto, on the basis of an original draft by the former Special Rapporteur. He drew attention to document A/CN.4/L.876, which reproduced the text of the draft principles, and invited the members of the Commission to proceed to their adoption.

Part One

General principles

Draft principles 4, 6, 7 and 8

Draft principles 4, 6, 7 and 8 were adopted.

Part Three

Principles applicable after an armed conflict

Draft principles 14 to 18

Draft principles 14 to 18 were adopted.

The text of the draft principles, as contained in document A/CN.4/L.876, was adopted.

First report on protection of the environment in relation to armed conflicts (A/CN.4/720)

The Chair invited the Special Rapporteur to introduce her first report on protection of the environment in relation to armed conflicts (A/CN.4/720).

Ms. Lehto (Special Rapporteur) said that the continuing interest of States and other bodies in the Commission's work on the topic had been manifested not only in the debates of the Sixth Committee in 2016 and 2017 but also in two resolutions of the United Nations Environment Assembly in 2016 (UNEP/EA.2/Res.15) and 2017 (UNEP/EA.3/L.5), which expressed support for the ongoing work of the Commission on the topic and requested the Executive Director to continue interaction with the Commission, *inter alia* by providing relevant information to the Commission at its request. She had held very useful consultations in relation to the preparation of the report with the United Nations

Environment Programme, from which the original suggestion that the Commission should look at the topic had come in 2009, and the International Committee of the Red Cross.

The topic had been on the Commission's programme of work since 2013 and had been under active consideration on the basis of the three reports submitted by the former Special Rapporteur in 2014, 2015 and 2016. That meant, as the Commission had noted in 2017, that a substantial body of work had already been done on the topic. Again in line with the conclusions of the Commission the previous year, the current report built on the previous three reports on the topic and sought to ensure coherence with the work that had been undertaken so far. For instance, she had not found it necessary to define the approach to or the methodology of the work in the report, as she could subscribe to what had been presented in that regard earlier and agreed to by the Commission. The report also built on the work accomplished so far in the sense that, in addition to proposing three new draft principles relative to situations of occupation, it contained an assessment of the relevance of the already adopted draft principles to such situations.

The words "in relation to" in the title of the topic indicated that the temporal scope of the topic was not limited to armed conflict, but was intended to cover the whole conflict cycle: before, during and after an armed conflict. The draft principles had been organized accordingly: those in Part One related to measures to be taken before an armed conflict, or principles that were of a general nature and relevant to all temporal phases; those in Part Two related to periods of armed conflict; and those in Part Three concerned post-conflict circumstances. For reasons explained in the report and to which she would come to later in her introduction, the proposed new draft principles relative to situations of occupation were placed in Part Four.

The broader approach had proved to be beneficial to the topic. Limiting the consideration to the law of armed conflict could have forced the Commission to walk on a trodden path, thus questioning the added valued that the topic could bring. The broader approach had enabled the Commission to identify particular legal issues relating to the protection of the environment that were likely to arise during the different stages of armed conflict and had facilitated the development of concrete draft principles. Furthermore, the temporal approach had made it possible and necessary to look at other relevant areas of law such as international human rights law and international environmental law that might complement the law of armed conflict.

The report focused on the protection of the environment in situations of occupation, one of the areas that had been identified in 2017 as requiring further consideration. While military occupation could be defined as a subcategory of international armed conflict, it had its own legal regime which required separate treatment. Moreover, the law of occupation provided a clear set of rules, the core of which had attained customary status. At the same time, that body of law — the 1907 Regulations concerning the Laws and Customs of War on Land (the Hague Regulations), complemented by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) and the Protocol additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I), as appropriate — lacked, for the most part, specific provisions on the protection of the environment. Compared to Part Two of the draft principles (situations of armed conflict), where the task was to identify existing rules of armed conflict directly relevant to the protection of the environment, the protection provided to the environment by the law of occupation was mostly indirect.

The specific provisions of the law of occupation that were highlighted in the report related, first, to property rights; second, to certain protected objects; and, third, to the general obligation of the occupying State to restore and maintain public order and civil life in the occupied territory. While the underlying rationale of those provisions was mainly related to ensuring property and exploitation rights and other economic interests, or the

survival and welfare of the civilian population, they provided indirect protection to the environment.

The rules of the law of occupation had proved flexible enough to be adapted to changing circumstances. Two concepts of the law of occupation relevant to the topic under consideration that lent themselves particularly well to evolutive interpretation were the notion of "civil life" in article 43 of the Hague Regulations and that of "usufruct" in article 55 thereof. The Commission had discussed the evolutive interpretation of treaties in the context of the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties". In that regard, the commentary to draft conclusion 8 [3], "Interpretation of treaty terms as capable of evolving over time", as set out in paragraph 76 of the Commission's report on its work at its sixty-eighth session (A/68/10) was of particular interest.

In that connection, the International Court of Justice had recognized evolutive interpretation as an acceptable method of treaty interpretation, notably in its 1971 advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, in which the Court had described such notions as "well-being and development", or "sacred trust"; in its 1978 judgment in the *Aegean Sea Continental Shelf (Greece v. Turkey)* case, in which the Court had stated that the meaning of certain generic terms was "intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time"; and its 2009 judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, in which the Court had declared that:

> "... where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."

Reference could also be made to other court cases which demonstrated a similar approach.

A certain flexibility was thus built in and recognized in the law of occupation. That was also related to the great variety of different situations of occupation in terms of stability and duration. The longer an occupation lasted, the more evident was the need for the occupying State to introduce changes so as to avoid stagnation and to be able to fulfil its duties under occupation law. It should be recalled in that respect that the occupying State was expected to administer the occupied territory for the benefit of the occupied population, and had a general obligation, under article 43 of the Hague Regulations, to ensure that the occupied population lived as normal a life as possible under the circumstances. Such an obligation had an obvious connection to the protection of the environment, given that environmental protection was widely recognized as belonging to the core functions of a modern State.

Other areas of law were also relevant in situations of occupation, the more so the longer the occupation lasted. A number of international court cases had confirmed not only that human rights law applied to situations of occupation but also that it played a more important role during the occupation than during the hostilities phase. In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice had stated that respect for the applicable rules of international human rights was part of the obligation of the occupying State under article 43 of the Hague Regulations. It had also confirmed that international human rights instruments were applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, "particularly in occupied territories". Reference

could also be made to the case law of the International Tribunal for the Former Yugoslavia, as well as that of the European Court of Human Rights, which had made it clear in several judgments that the European Convention on Human Rights applied in situations in which a State party exercised effective control of an area outside its national territory.

Regarding the issue of the relationship between human rights law and the law of occupation as *lex specialis*, she wished to draw attention to the report of the Commission's Study Group on the fragmentation of international law, which pointed out that the power of a *lex specialis* norm was "entirely dependent on the normative considerations for which it provided articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness". On that basis, it could be said that the law of occupation was often better adapted to the specific context of occupation, namely provisional nature, coercion and occasional instability. In more established situations and, in particular, in protracted occupations, the limitations of the law of occupation nevertheless became obvious. Human rights, and in particular economic, social and cultural rights, provided the occupying State with useful guidance regarding the obligation to restore and maintain public order and civil life in circumstances that approximated peacetime.

The connection between human rights and the environment had been recognized worldwide. It was a vast topic which was addressed in the report only briefly, using the right to health as an example which showed how the human rights obligations of an occupying State with regard to the right to health complemented the related rules of the law of occupation and how that required environmental protection and contributed to it.

The report also discussed the relevance of international environmental law and concluded that both customary and conventional environmental law continued to play a certain role in situations of occupation. As far as customary law was concerned, reference could be made to the 1996 advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, which provided important support in that regard. The Commission's own 2011 draft articles on the effects of armed conflicts on treaties indicated that, *inter alia*, treaties relating to the international protection of the environment might continue to operate during armed conflict. To the extent that such treaties addressed environmental problems that had a transboundary nature, or a global scope, and the treaties had been widely ratified, it might be difficult to conceive suspension only between the parties to a conflict.

Turning to chapter IV, which contained the proposed draft principles, she said that they had been placed in a separate Part Four for the simple reason that parallels could be drawn between occupations and armed conflicts, on the one hand, and occupations and post-conflict circumstances, on the other, depending on the nature of the occupation.

A second general point that she wished to make at the current juncture was that all the draft principles, including those adopted at that meeting, were cast at a high level of abstraction. What the general obligations or recommendations would entail in practice had been specified in the commentaries. She had followed the same approach with regard to the three draft principles proposed in the report under consideration.

Turning to draft principle 19, she said that the obligation of the occupying State to respect the environment of the occupied territory, as provided for in paragraph 1 of the draft principle, could be based on the general thrust of article 43 of the Hague Regulations, in particular the requirement to take care of the welfare of the occupied population. The obligation to ensure that the occupied population lived as normal a life as possible in the prevailing circumstances should be interpreted to entail environmental protection as a widely recognized public function of the modern State.

Moreover, environmental concerns could be said to relate to an essential interest of the territorial sovereign, which the occupying State, as a temporary authority, must respect.

The existence of such a general obligation was supported by human rights law, as discussed in chapter III of the report. There was a close link between key human rights, such as the rights to food, health and life, on the one hand, and the protection of the quality of the soil, water and even biodiversity in order to ensure viable and healthy ecosystems, on the other.

The wording of the first sentence of paragraph 1 was based on the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, in paragraph 33 of which the Court had stated:

> "... while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict."

The Permanent Court of Arbitration, in the *Iron Rhine Railway* case, had used the formulation "environmental considerations", stating that "where a State exercises a right under international law within the territory of another State, considerations of environmental protection also apply".

While paragraph 1 could rely on authoritative sources as far as the term "environmental considerations" was concerned, she acknowledged that the passive form in the first phrase might not be particularly successful and proposed to align the wording of the sentence with that of paragraph 50 of the report to read: "The occupying State has a general obligation to respect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory, including ...".

The second part of paragraph 1 was based on the established understanding of the scope of a military occupation. Once established in a certain land territory, the authority of the occupying State was seen to extend to adjacent maritime areas and the superjacent airspace.

Paragraph 2 recalled the obligation of the occupying State, by virtue of article 43 of the Hague Regulations and article 64 of the Fourth Geneva Convention, to respect, unless absolutely prohibited, the legislation of the occupied territory pertaining to the protection of the environment. The requirement that the occupying State should respect the laws and institutions of the occupied country had the potential to be an important safeguard for the environment, depending on how effectively the environment and natural resources were protected in national legislation. It might be assumed that most States, if not all, had introduced laws and regulations pertaining to the protection of the environment. Environmental rights had been recognized at national level in the constitutions of more than 100 States. Major multilateral environmental agreements had moreover attracted a high number of ratifications, which made it likely that either the occupied State or the occupying State or both were parties to them. Especially when incorporated into the legislation of the occupied State, such conventions would be covered by the obligation of the occupying State to respect the laws and institutions of the occupied territory.

Draft principle 20 stated that an occupying State must administer national resources in an occupied territory in a way that ensured their sustainable use and minimized environmental harm. That principle was based on article 55 of the Hague Regulations, which provided for the occupying State's administration of the natural resources of the occupied territory (excluding natural resources as private property, which were subject to other and, in general, more protective rules). It should be recalled in that regard that many natural resources were also important environmental resources. The destruction, depletion or unsustainable utilization of natural resources might lead to the degradation of ecosystems, including the loss of habitat and species.

As was pointed out in the report, usufruct was a broad principle that did not entail specific obligations for occupying States. It had traditionally been interpreted to refer to good housekeeping, according to which the usufructuary "must not exceed what is necessary or usual" when exploiting the relevant resource. Such a criterion necessarily reflected the particular context in which it was used. The notion of sustainable use of natural resources had been described as "a prolongation of the concepts of resource protection, resource preservation and resource conservation, as well as those of wise use, rational use or optimum sustainable yield"; in that sense, it provided the modern equivalent of usufruct. The general duties of the occupant under article 43 of the Hague Regulations also supported the inclusion of sustainability as a major consideration to be taken into account in the administration and exploitation of the natural resources of an occupied territory.

How the requirement of sustainable use of natural resources would translate into practice in a situation of occupation obviously depended on the specific circumstances such as the nature of the occupation and the duration, extent and scale of any exploitation project. Moreover, the actions of the occupying State should not interfere with the sovereign right of the territorial State to decide on its environmental and developmental policies in the exploitation of natural resources of the occupied territory.

In that sense, and referring to the established understanding of the concept of usufruct, it was proposed that the occupying State should exercise caution in the exploitation of non-renewable resources and not exceed pre-occupation levels of production. Renewable resources should be exploited in a manner that ensured their long-term use and the resources' capacity for regeneration.

The wording of draft principle 20 was based on article 54 (1) of the International Law Association's Berlin Rules on Water Resources.

Draft principle 21 provided that an occupying State must use all means at its disposal to ensure that activities in the occupied territory did not cause significant damage to the environment of another State or to areas beyond national jurisdiction. The responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction had been called "the cornerstone of international environmental law" and "the most accepted principle of international environmental law as yet". The obligation not to cause harm to the environment of other States was generally seen as customary law in the context of environmental protection. Regarding the applicability of that principle in the specific context of occupation, reference could be made to the advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, in which the Court had underlined the international obligations and responsibilities of South Africa towards other States while exercising its powers in relation to the occupied territory, stating that "physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States". Furthermore, the Court had referred to the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control in other recent cases, such as *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and the joined cases concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*.

The Commission's articles on the prevention of transboundary harm from hazardous activities also stated that the obligation applied to activities carried out within the territory or otherwise under the jurisdiction or control of a State. It should be recalled that the Commission had consistently used that formulation to refer not only to the territory of a State but also to the activities carried out in other territories under the State's control. As explained in the commentary to article 1 on the prevention of transboundary harm, "it

covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks *de jure* jurisdiction, such as in cases of unlawful intervention, occupation and unlawful annexation". It seemed therefore well grounded that an occupying State had to observe the "no harm" principle (due diligence) so as to prevent serious transboundary harm to the environment of third States.

The formulation of the proposed principle was based on paragraph 101 of the *Pulp Mills* judgment of the International Court of Justice. It should be noted that the words "at its disposal" allowed for flexibility depending on the prevailing circumstances.

Turning to the relevance of the earlier adopted draft principles to situations of occupation, she said that the relevance of the principles in Part One to situations of occupation did not seem to be in doubt. The basic premise of the draft principles in Part One — such as designation of protected areas — was that the proposed measures were taken with a view to enhancing the protection of the environment in the event of an armed conflict. Such an armed conflict might or might not include an occupation.

To the extent that periods of intense hostilities during an occupation were governed by the rules concerning the conduct of hostilities, the draft principles in Part Two concerning the protection of the environment in the "during" phase would be applicable as such. Additionally, the environment of an occupied territory would continue to enjoy the general protection accorded to the natural environment during an armed conflict in accordance with applicable international law and, in particular, the law of armed conflict as reflected in draft principle 9.

With regard to Part Three, she had tentatively suggested that certain draft principles addressing post-conflict situations, namely draft principles 15, 16, 17 and 18, were relevant also to situations of occupation. Although she was not proposing new language for those draft principles, she would make the necessary additions to the relevant commentary.

The wording of draft principle 15, on post-armed conflict environmental assessments and remedial measures, was broad enough to include measures that might be taken by an occupying State, but which did not imply the existence of a legal obligation. The cooperation of the occupying State could be encouraged if it was in a position to contribute to post-conflict environmental assessments or remedial measures.

Draft principle 16, on remnants of war, explicitly referred to areas under the jurisdiction or control of a State and therefore seemed to cover situations of occupation.

Draft principle 17, on remnants of war at sea, contained a general reference to States that reflected the different legal situations in which remnants of war at sea might constitute a danger to the environment: a particular State might have either sovereignty or jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction with regard to the area in which the remnants were located. Such remnants could also be located in a sea area under the control of an occupying State.

While the ability of the occupying State to share or grant access to information obviously depended on the security situation, paragraph 2 of draft principle 18, on sharing and granting access to information, contained an exception addressing security concerns.

In her report, draft principle 6 on the protection of the environment of indigenous peoples had mistakenly been referred to in the context of Part Three. Draft principle 6 was one of the principles of general application that belonged to Part One, which in her view was in its entirety relevant to situations of occupation. The Secretariat had been requested to issue a corrigendum.

It was her intention to submit another report in 2019, which would address certain questions related to the protection of the environment in non-international armed conflicts.

including how the international rules and practices concerning natural resources might enhance the protection of the environment during and after such armed conflicts, as well as certain questions related to the responsibility and liability for environmental harm in relation to armed conflicts. Issues related to the consolidation of a complete set of draft principles would also need to be considered.

Mr. Park said that he wished to congratulate Ms. Lehto once again on her appointment as Special Rapporteur and welcomed the resumption of discussion of the topic "Protection of the environment in relation to armed conflicts".

He would like to express appreciation for the efforts of the Special Rapporteur in preparing the first report, which dealt comprehensively and thoroughly with the protection of the environment in the context of situations of occupation and contained proposals for three draft principles. While situations of military occupation were rare in the twenty-first century, they still existed in parts of the world, providing the *raison d'être* of the discussion on the relevant legal regime concerning the protection of the environment during occupation.

The approach the Special Rapporteur had adopted in addressing the topic, as described in paragraph 16 of her report, was, in his view, an appropriate one which would ensure coherence with the work that had been undertaken in the previous three reports on the topic. He supported the Special Rapporteur's view that the Commission should maintain its position of not modifying the law of armed conflict.

He did, however, have some doubts about the flow of reasoning deriving the principle and/or obligations on the topic. Firstly, with regard to the relationship between "protection of environment" and "property rights", he observed that the Special Rapporteur derived obligations to protect the environment from provisions on property rights, particularly those contained in articles 53 and 55 of the Hague Regulations. Such provisions had been interpreted as applying to natural resources, which were important aspects of the environment.

While he agreed that the constituent elements of the natural environment qualified, in principle, as civilian objects, obligations to protect the environment were not always drawn from or based wholly on property rights or usufruct since there were two kinds of environment: the environment *per se* and the environment as it was more closely related to human beings. While the latter could perhaps be explained through the concept of property rights, that was not the case for the former. The draft principles adopted provisionally by the Drafting Committee also clearly made the distinction between two categories of environment by using the term "natural environment". It should also be noted that currently many international conventions on the environment made a distinction between "environmental damage" and "personal damage" or "property damage".

Consequently, the occupying State's obligation to protect the environment could be found in and derived from, *inter alia*, the expectation that the occupying State should administer the occupied territory for the benefit of the occupied population, the principle of permanent sovereignty over natural resources, the principle of self-determination and the need for the *status quo ante* to be maintained. Without depending on the contention as to property rights, it could be assumed that the requirement for the occupying State to respect the laws and institutions of the occupied country served as a safeguard for the protection of the environment.

Secondly, the Special Rapporteur had used deductive rather than inductive reasoning, noting in paragraph 26 of the report that State practice on the actual application of the law of occupation was limited to a handful of cases. There was therefore insufficient State practice regarding the protection of environment in situations of military occupation. While the use of deductive reasoning was consequently unavoidable, he had doubts about

the overarching and somewhat simplified flow of logic in three steps in the report, especially in chapter II, whereby (1) human rights law applied to situations of occupation, (2) human rights included the issue of the protection of environmental rights, and therefore (3) the environment must be protected as an obligation in the situation of occupation. There was perhaps a logical leap in that reasoning.

While it was true that the International Court of Justice had underlined the relevance of human rights law in times of occupation and the occupying State's legal obligation to take human rights law into account with regard to both its actions and its policies in the occupied territory, as emphasized throughout the report, the question at stake was no longer whether or not human rights law applied in occupied territory, but rather how, and to what extent, it applied in such circumstances. In that regard, he urged the Special Rapporteur to further develop the relative application of human rights law in different situations of occupation, which was mentioned in paragraph 55 of the report in the following terms: "While it is generally agreed that human rights law applies in situations of armed conflict, it is equally non-contentious that its application must be qualified, taking into account the specific requirements of the law of armed conflicts."

Such overarching and somewhat simplified reasoning was similarly found in chapter III, entitled "Role of international environmental law in situations of occupations", particularly in paragraph 80 of the report, which stated "it is possible to conclude that international environmental law, both customary and conventional, continues to play a certain role in situations of occupation". Of course, the protection offered by international environmental law might usefully supplement that offered by international humanitarian law. However, only a small number of multilateral environmental treaties specifically addressed the issue of their applicability to situations of armed conflict. The Special Rapporteur cited the 2011 draft articles on the effects of armed conflicts on treaties in support of her reasoning; however, he was unsure whether those draft articles applied to occupation, since the commentary to draft article 1, entitled "Scope", did not explicitly mention the situation of occupation. It was unclear whether the Commission had omitted such mention intentionally.

Since, in the possible application of human rights law and international environmental law, much depended on the nature and duration of the occupation, such relativity should be more carefully nuanced in the draft principles proposed by the Special Rapporteur. In addition, it should be noted that two different and opposite parameters existed between international humanitarian law and human rights, namely the fulfilment of military needs and respect for the interests of the occupied population.

Thirdly, since, as noted in paragraph 19 of the report, a situation of military occupation was a specific form of international armed conflict which constituted an intermediate phase between war and peace, it was not possible to limit a period of military occupation to one of the three specific phases identified in the context of the current topic, namely before, during or after armed conflict. In that respect, it would be appropriate to deal with the situation of occupation separately in Part Four of the draft principles.

The notion of occupation required further clarification. Firstly, it should be mentioned that the law of occupation applied only in international armed conflicts. It did not apply to non-international armed conflicts; for example, the retaking by a central government of parts of its territory previously held by insurgents or the occupation by insurgents of part of the national territory were not within the meaning of the law regarding occupation. Secondly, occupation ought to be specified as referring to "military occupation" and as excluding "pacific occupation", which occurred with the consent of the host State. Thirdly, occupying parties should cover not only States, but also international organizations, since the latter might also be an occupying entity or power. In draft principles 7, 8, 14, 15, 16, 17 and 18 provisionally adopted by the Drafting Committee, for

example, it had been acknowledged that in certain situations, international organizations might engage in activities concerning the protection of environment in relation to armed conflicts.

Overall, it would be true that in discussing the obligations of the occupying State, much depended on the nature and duration of the occupation. Indeed, that concern had been employed in the conclusion of the International Law Association in the context of the due diligence obligations of occupying States, in which it had been noted that the extent of their obligations would vary according to the degree of control they exercised.

The Special Rapporteur had carefully detailed the three phases of occupation, namely the initial phase of an occupation, more established situations of occupation and a prolonged occupation. However, he was unsure whether such considerations had been taken into account, since the proposed draft principles did not reflect such a distinction, and the principles applicable during armed conflict and those applicable in military occupation were almost identical. If, as the Special Rapporteur noted in paragraph 19 of the report, occupations could be said to constitute an intermediate phase between war and peace, it would be better to state clearly that the draft principles contained in Part Two and in Part Three would apply *mutatis mutandis* in the situation of occupation. Such a proposal could be supported since it was unclear when an occupation began and ended.

Noting that, contrary to previous practice, the Special Rapporteur had not provided titles for Part Four or the draft principles, he said that he wished to propose the following title for Part Four: "Part Four (Principles applicable in situations of occupation)", which was consistent with the titles of the previous parts, namely: Part One (General principles), Part Two (Principles applicable during armed conflict) and Part Three (Principles applicable after an armed conflict).

Paragraph 1 of draft principle 19 articulated an obligation of the occupying State to take environmental considerations into account in the administration of the occupied territory, which had already been stipulated as an obligation during armed conflict in draft principle 11 [II-3]. In such environmental considerations, the scope would be limited to areas where an occupying State had effective control, in other words where an occupying State had established its authority and retained the capacity to exercise such authority, and not to areas where the territorial State was entitled to exercise sovereign rights, as the Special Rapporteur had suggested. As noted in paragraph 21 of the report, article 42 of the Hague Regulations also regarded effective control as the main characteristic of the situation. He therefore proposed the deletion of the final phrase "including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights". That phrase would be unnecessary if the limitation on the scope of obligation for the occupying State was explained clearly in the commentary.

While he had no objection to paragraph 2, he proposed the addition of two sentences — to become new paragraphs 3 and 4 — regarding the varying extent of obligations according to the degree of control and the phases of occupation. The proposed new text would read:

> "3. The extent of obligations upon the occupying State may vary according to the degree and the period of control.
>
> 4. The principles enumerated in Part Two and Part Three will apply *mutatis mutandis* in the situation of occupation."

If the Commission accepted his earlier proposal that occupying parties should cover not only States but also international organizations, the words "the occupying State" in draft principle 19 should be replaced with "the occupying State and international

organization" or simply "the occupying Power". Lastly, he proposed that the title of draft principle 19 should be: "General obligations of the occupying State or occupying parties".

In stressing the general duties of the occupying Power, it was appropriate to refer in draft principle 20 to sustainability as a major consideration to be taken into account in the administration and exploitation of the natural resources of an occupied State. In practical terms, however, such considerations might only be applicable in situations of prolonged occupation, or at least more established situations.

He wished to draw attention to the legal character of "sustainable development". The Special Rapporteur noted in paragraphs 94 to 97 of the report that sustainable development *per se* had not been recognized as a legal obligation or principle, but as a policy objective. The Commission had already discussed the legal status of "sustainable development" in its consideration of other topics, including "Protection of persons in the event of disasters" and "Protection of the atmosphere". In the context of the topic of protection of the atmosphere, as pointed out in footnote 1275 of the commentary to draft guideline 5, on sustainable utilization of the atmosphere, in a number of international arbitration cases "sustainable development" had been mentioned as an "emerging principle" (A/71/10, p. 292). It was unclear whether "policy objective" and "emerging principle" had different legal meanings. He was therefore unsure whether draft principle 20 could be formulated as a legal obligation by using the word "shall". Since the rule of usufruct was a broad principle that did not entail specific obligations for occupying States, he proposed that the word "shall" should be replaced with "should". He proposed that the title of draft principle 20 should be: "Ensuring sustainable use of natural resources".

Draft principle 21 dealt with the occupying State's obligation not to cause damage to the environment of another State in conducting activities in the occupied territory. Such obligation was generally seen as customary law in the context of environmental protection. Whether that obligation could be applicable not only in peacetime but also during armed conflicts and occupation was debatable. As the Special Rapporteur had noted, the Commission's 2001 articles on the prevention of transboundary harm from hazardous activities explicitly covered situations of occupation. While he agreed that an occupying power had environmental obligations both within the occupied territory and with regard to the avoidance of transboundary harm, it was possible to foresee situations in which the occupying power invoked the application of the principle of proportionality or the rules on military necessity as exonerating it from its environmental obligations. He proposed that the title of the draft principle 21 should be: "Ensuring not to cause transboundary harm".

Although the Special Rapporteur had stated that questions related to the protection of the environment in non-international armed conflict would be dealt with in the second report, the general direction of the Commission's discussion, as reflected in the provisionally adopted draft principles, did not distinguish between international and non-international armed conflict. It would be helpful for an understanding of future work on the topic if the Special Rapporteur could provide a clear explanation on that point.

Regarding the relevant rules on occupation applicable to the previous work, there were two possible ways forward: either to clarify in the relevant commentary the relationship of the draft principles to situations of occupation rather than adding new wording to them, or to insert a *mutatis mutandis* clause in draft principle 19.

Mr. Hmoud said that he would be interested to hear about any examples of an international organization being recognized as an occupying Power.

Mr. Park said that, while there was no specific practice, specialist authors had made reference to such a situation.

The meeting rose at 11.30 a.m.

Provisional

For participants only

3 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3427th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 11 July 2018, at 10 a.m.

Contents

Protection of the environment in relation to armed conflicts (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Protection of the environment in relation to armed conflicts (agenda item 7) (*continued*) (A/CN.4/720)

The Chair invited the Commission to resume its consideration of the first report of the Special Rapporteur on protection of the environment in relation to armed conflicts.

Mr. Nguyen said that one of the primary purposes of the report was to clarify the protection of the environment in situations of occupation with a view to filling the existing gap in the law of occupation, where provisions on environmental protection were mostly indirect. The Special Rapporteur had faced challenges due to the requirement not to seek to modify the law of armed conflict and developments in the law of armed conflict in conjunction with international humanitarian law, international human rights law, international environmental law and other branches of law. The concepts of "occupation" and "environment" needed to be considered in light of the terms "post-armed conflict" and "natural environment" used in the reports of the former Special Rapporteur on the topic, Ms. Jacobsson. In addition, there was a need for consistency in the use of the terms "law of occupation", "law of armed conflict" and "law applicable in armed conflict".

There were various definitions of the concept of occupation, from article 42 of the Regulations concerning the Laws and Customs of War on Land (the Hague Regulations) of 1907 to decisions of the International Tribunal for the Former Yugoslavia and the Eritrea-Ethiopia Claims Commission and the 2016 commentary of the International Committee of the Red Cross on common article 2 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the First Geneva Convention). Traditionally, in the law of armed conflict, "occupation" involved invasion and placing the occupied territory under the authority of a hostile army which met with no armed resistance. However, the concept of occupation should be updated to reflect recent conflicts, as hostilities could sometimes continue even when there was no armed resistance. In some conflicts, such as the Viet Nam war or the situation in the Gaza Strip, the occupying Power had had control in the daytime, while resistance groups had exercised *de facto* control at night. The capacity of occupying States to comply with their obligations to protect the environment of occupied territory was further complicated by the mix of international and non-international armed conflicts.

Generally speaking, occupation could be defined as the presence of foreign armies in the territory of a State without the latter's consent. The occupying force could be the army of a State or coalition of States, or even an army placed at the disposal of the United Nations for the purpose of maintaining international peace and security. The latter scenario — in which an occupying army was at the disposal of an international organization — was potentially a new subject of the law of armed conflict and should be considered in the context of the current topic.

Control over some parts of an occupied territory could be exercised by a local surrogate acting on behalf of the occupying State, but draft principles 19, 20 and 21 focused only on the obligations of occupying States. In his opinion, the draft principles should address the different obligations of occupying States and other parties during occupation. The post-conflict phase of a conflict covered the whole occupation process, regardless of whether it was short or prolonged in duration. He proposed that the neutral terms "occupying Power" or "occupying administrator" should be used instead of "occupying State" in the draft principles. He believed that Mr. Park was also of the view that a suitable term should be found to replace "occupying State".

In her second report on the topic (A/CN.4/700), the previous Special Rapporteur had noted that situations of occupation were not only confined to the post-conflict phase of armed conflict. While the law of occupation was broader than the law of armed conflict, situations of occupation, as part of the post-conflict phase, were covered by the law of armed conflict. In that sense, he agreed with the Special Rapporteur's assertion in paragraph 27 that "the law of occupation is a specific subset of the law of armed conflict". Accordingly, the legal consequences of occupation, such as compensation for environmentally harmful actions during the occupation, could be dealt with under the rules of the law of armed conflict even if the occupation had ended. A good example of that was

the processing of claims by the United Nations Compensation Commission for the purposes of awarding compensation for losses resulting from the Iraqi invasion and occupation of Kuwait. That point should be taken into consideration in order to ensure consistency in the use of terms by the two special rapporteurs and to avoid fragmentation of the law. Draft principles 19 to 21 should be aligned with draft principle 2, which stipulated that "the present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict".

The law of armed conflict, which predated environmental law, focused on the protection of individuals. The Special Rapporteur had made an excellent analysis of the links between the law of armed conflict and humanitarian law, human rights law and environmental law in the sections of her report on the right to health and the sustainable use of natural resources. From the point of view of sustainable development, the right to live in a "clean environment" must now be ensured in all situations, even in armed conflicts. The obligation to protect the environment and promote sustainable development was crystallized in multilateral conventions and the practice of States. The report should have included more references to multilateral agreements related to sustainable development, such as the 1974 Charter of Economic Rights and Duties of States, the Johannesburg Declaration on Health and Sustainable Development, the United Nations Millennium Declaration and the outcome document of the United Nations Conference on Sustainable Development. The obligation to ensure environmental protection and sustainable development remained unchanged regardless of any change in administration. Permanent sovereignty over natural resources and the right of self-determination could not be violated even in a situation of occupation. In view of that, he supported the Special Rapporteur's assertion that the occupying State had a general obligation to respect the environmental laws and institutions of the occupied territory and to take environmental considerations into account in the administration of such territory. The occupying Power could modify the existing laws and institutions of the occupied territory only for the purpose of improving the living environment of the occupied population.

Armed conflicts adversely affected the environment of the territories inhabited by local peoples. In the interplay of humanitarian law, human rights law and environmental law, environmental issues related to armed conflicts could not be limited to the "natural environment", the term used in a number of the draft principles. A dictionary definition of "environment", the term used in the other draft principles, said it was "the surroundings or conditions, including natural resources, natural environment and cultural heritage, in which a person, animal, or plant lives or operates". In that sense, a reference to the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage could be included in the context of protection of the environment in situations of occupation.

Draft principles 19 to 21 regulated the activities undertaken in situations of occupation. Though occupation might be considered part of the post-armed conflict phase, the termination of occupation did not mean that that phase had ended. Therefore, the Special Rapporteur should consider the appropriate place for draft principles 19 to 21 in relation to draft principles 14 to 18, which dealt with "Principles applicable after an armed conflict" and which had already been provisionally adopted. In her introduction, the Special Rapporteur had suggested that certain draft principles addressing post-conflict situations, particularly draft principles 15 to 18, were also relevant to situations of occupation. Mr. Park had also suggested that the draft principles in parts two and three would apply *mutatis mutandis* in a situation of occupation. If it was decided to separate the principles applicable to situations of occupation, the reasons for doing so should be given in the commentaries.

Turning to the draft principles themselves, he said that he had no objection to draft principle 19 (1), which stipulated that environmental considerations must be taken into account by the occupying State in the administration of the occupied territory. That obligation should apply to both temporary and prolonged occupations. The draft principle seemed to provide for the situation of occupation of the whole territory by the occupying State and did not cover the, albeit rare, scenario of occupation by armed peacekeeping forces placed at the disposal of the Security Council. In that respect, the relationship between draft principles 7 and 8 and draft principles 19 to 21 should be clarified, and the term "State" could be replaced with "Power" so as to cover all possible scenarios. The

obligation to take environmental considerations into account in the activities of occupying Powers in the occupied territory must extend to any adjacent maritime areas and the airspace over the occupied territory and the adjacent maritime areas. Consequently, draft principle 19 (1) could be amended to read: "Environmental considerations shall be taken into account by the occupying Power in the effective administration of the occupied territory, including in any adjacent maritime areas and airspace over which the territorial State is entitled to exercise sovereign rights."

Draft principle 21 referred to transboundary environmental pollution but did not cover situations of partial occupation in which the environmental damage could spread to the unoccupied part of the territory. The obligation to cooperate to prevent, reduce or control any transboundary environmental pollution between occupying Powers, other relevant States and organizations in specific cases should also be covered.

Concerning future work, he agreed with the Special Rapporteur that the second report should address certain questions related to the protection of the environment in non-international armed conflicts. In the administration of the occupied territory, the occupying Power was obliged to respect the sustainability principles adopted at the World Summit on Sustainable Development. Thus, the next report should propose new draft principles on other environmental practices such as the precautionary principle and the polluter-pays principle. Control and coercive measures relating to environmental quality should also be addressed, as should the question of compensation for environmental harm caused by the actions of the occupying Power, such as the use of nuclear weapons, during and after a conflict.

In conclusion, he supported sending all the draft principles to the Drafting Committee for further review and improvement.

Mr. Murase said that the Special Rapporteur's report was well researched and well structured. It might be helpful to remind readers that, while the draft principles were supposed to cover both international and non-international armed conflicts, the law of occupation was applicable only to international armed conflict and, as such, draft principles 19 to 21 were not applicable to non-international armed conflict.

In applying the law of occupation, a clear distinction should be drawn between "belligerent occupation" and "pacific occupation". The former related to the period during an armed conflict, while the latter was relevant to the post-conflict phase. Belligerent occupation was generally considered incidental to military operations, including hostilities, and its legitimate objective was to weaken the military forces of the enemy. It was necessary to recognize that, while certain inhumane weapons and warfare were prohibited, *jus in bello*, or the law of armed conflict, was essentially a body of rules that authorized killing and injuring enemies on the battlefield. Protection of the environment in such a context was a remote concern, if not irrelevant to the parties engaged. If military necessity prevailed over environmental considerations, parties to an armed conflict could be permitted to employ any means of warfare available — including in a situation of belligerent occupation — unless specifically prohibited by the law of armed conflict.

In contrast, pacific occupation was that which continued after the general close of military operations. In such situations, the occupying State could derogate from the application of the general law of occupation by concluding a special agreement with the occupied State to regulate post-conflict matters. Such occupation was not regarded as belligerent because its objectives were no longer to weaken the military forces of the enemy. For example, towards the end of the Second World War, Okinawa, the southern archipelago of Japan, had been under the belligerent occupation of the United States of America from June to August 1945. During those two months, the war between mainland Japan and the Allied Powers had continued. The war had ultimately ended with the acceptance by Japan of the Potsdam Agreement, essentially an armistice agreement, which had also marked the beginning of pacific occupation. In other words, the Allied occupying Powers had been able to derogate from their obligations under the law of occupation by concluding the Potsdam Agreement with Japan. Pacific occupation had lasted until 1952. A similar case was the occupation of Iraq in 2003, when the Coalition Provisional Authority of the occupying Powers had derogated from the general law of occupation on the basis of

Security Council resolution 1483. In that respect, he had found Sir Michael Wood's second statement to the Iraq Inquiry in the United Kingdom useful.

Neither the Potsdam Agreement nor Security Council resolution 1483 had foreseen that the parties to the armed conflicts in question would continue hostilities. Rather, those instruments had been intended to regulate post-conflict situations. Thus, while belligerent occupation should be considered in the second temporal phase of the conflict (during the armed conflict), pacific occupation should be considered in the third phase (post-armed conflict), and was related to draft principle 14, on "peace processes". It seemed to him that the Special Rapporteur's argument might be more pertinent to pacific occupation than belligerent occupation, although she based it on instruments related to the latter. He would therefore urge her to consider formulating separate provisions on belligerent occupation on the one hand and pacific occupation on the other.

The concept of "occupation" was relevant only to land warfare, and not necessarily to air and sea warfare. He therefore disagreed with the Special Rapporteur's statement in the last sentence in paragraph 21 of the report. He did not believe that the authority established in a certain land territory by an occupying State *ipso facto* extended to the adjacent sea areas and airspace. That point was clarified in article 42 of the Hague Regulations, which provided that: "The occupation extends only to the territory where such authority has been established and can be exercised". In that respect, even if the occupying State exercised effective control over the adjacent sea and airspace of the occupied areas, the scope of application of the law of occupation normally did not extend to the sea and airspace.

The underlying idea of the law of occupation was the distinction between the dominium of the occupied State and the imperium of the occupying State. While a State normally possessed both imperium and dominium as components of its sovereignty, it lost imperium when it was occupied by a foreign State. Although the occupying State exercised *de facto* authority or jurisdiction over certain land territory, it could not claim *de jure* title and sovereignty over that territory. The law of occupation was intended to regulate such exercise of *de facto* authority. Thus, unlike the legitimate Government of a State, whose sovereignty *ipso facto* extended also to its territorial sea and airspace even if it did not exercise authority over those areas, the territorial sea and airspace being "appurtenances" to the land, the occupying Power had no such extension of power. Even if the occupying State exercised *de facto* authority over the adjacent sea or airspace, the territorial scope of the law of occupation did not extend to those areas unless the "population" of the occupied State was to be found in those areas. Thus, in his view, the last phrase proposed in draft principle 19 (1), "including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights," should be qualified or perhaps deleted.

It should be noted that the particular circumstances of an occupation might substantially limit the protection which could be afforded to the environment. Article 43 of the Hague Regulations required the occupant to respect the laws of the occupied country "unless absolutely prevented" from doing so, whereas article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) allowed an occupying Power to repeal or suspend the laws of the occupied territory in some cases. Hence it could suspend the environmental laws of the occupied State in order "to ensure the security of the Occupying Power, [and] of the members and property of the occupying forces or administration". Instances of such suspension abounded in situations of belligerent occupation. For that reason, draft principle 19, which was largely applicable to pacific occupation after an armistice, might have to be qualified in respect of belligerent occupation. He was not in favour of evolutionary interpretation and wondered on what treaty provision the draft article was purportedly based.

Turning to chapter III of the report, he considered that, while some rights embodied in human rights instruments, such as the right to private and family life and the right to property, were connected with the protection of the environment, they were more in the nature of peacetime considerations and their applicability to situations of armed conflict should not be overemphasized. In that respect, he drew attention to the passage in the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in which the International Court of Justice had held that the protection

offered by human rights conventions did not cease in cases of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. Both the latter and the European Convention on Human Rights permitted derogations from the right to private and family life. Those derogations were, however, restricted by the principles of proportionality, non-discrimination and consistency. For that reason, it could be said that the application of human rights norms relating to the environment was limited in situations of occupation. He was puzzled by the lack of any reference to human rights law in the three draft principles proposed by the Special Rapporteur and wondered if they should include a provision indicating that human rights law had a role to play in complementing the law of occupation for the protection of the environment of the occupied territory.

With regard to draft principles 20 and 21, he noted that the draft articles on the effects of armed conflicts on treaties were of relevance only to the potential applicability of peacetime norms, but were silent on the exact extent of their applicability to actual armed conflicts. The Commission should therefore try to identify the exact extent to which a particular norm of international environmental law could be applied in a manner consistent with the law of occupation. Since sustainable development was essentially a concept that sought to establish a balance between economic development and environmental protection and since the law of belligerent occupation was not premised on economic development, that notion was inappropriate to the draft principles.

According to article 6 of the articles on responsibility of States for internationally wrongful acts, the territorial State was responsible for acts of a foreign Government's organ only if the latter exercised elements of the governmental authority of the sovereign State. He therefore wondered whether responsibility for breaches of environmental law should be allocated to the occupying or the occupied State. The commentary to the draft article would seem to suggest that the situation would be different depending on whether occupation was belligerent or pacific.

He felt strongly that it was important to consider phase II situations (during the conflict) and phase III (post-conflict) situations separately. A situation also arose subsequent to a post-conflict situation that might be termed a phase IV situation, such as that found in Okinawa, where United States military bases were causing such environmental problems that further efforts needed to be made by the Governments of the United States and Japan to remedy the situation.

He did not think that there had been any precedents with regard to international organizations' involvement in occupation. After the signing of the Military Armistice Agreement in 1953, the United Nations had acted as an administrative authority but not as an occupying Power in part of Korea, as it had in Angola, Cambodia and the former Yugoslavia. The Economic Community of West African States had intervened in Liberia and Côte d'Ivoire, but never as an occupying Power. North Atlantic Treaty Organization (NATO) forces had formed the core of peace support operations in the former Yugoslavia, but not as an occupying Power.

He was in favour of referring all three draft principles proposed by the Special Rapporteur to the Drafting Committee.

Ms. Galvão Teles said that she supported the approach to the topic adopted by the Special Rapporteur in her first report. The question of complementarity with other relevant areas of international law could be addressed in the draft principles or fleshed out in the commentary to them on the basis of chapters II and III of the report. Chapter II, on protection of the environment in situations of occupation through international human rights law, where the Special Rapporteur had focused on the right to health, could have dealt with other human rights which could likewise be affected in such situations, especially in view of the fact that article 55 of Protocol I additional to the Geneva Conventions of 1949 also referred to the survival of the population.

Turning to draft principles 19 to 21, she noted that the report had largely succeeded in identifying and clarifying the guiding principles and obligations relating to the protection of the environment under international law in situations of occupation. Generally speaking, it was unnecessary to define "occupation" in the body of the draft principles, as it could be

defined in the commentary on the basis of the cumulative conditions listed in paragraph 23 of the report. It would be more appropriate to use the term "occupying Power" rather than "occupying State" and, for the sake of consistency with the other draft principles which had already been provisionally adopted by the Commission or the Drafting Committee, draft principles 19 to 21 should have titles.

The redrafting of paragraph 1 of draft principle 19 suggested by the Special Rapporteur in her oral introduction improved the text. The commentary to the draft principle should explain what exceptional circumstances would be deemed to prevent an occupying Power from respecting the occupied territory's environmental legislation as required by international humanitarian law. In order to cover the occupation of non-self-governing territories and similar situations, it would be advisable, in the second part of paragraph 1, to opt for more general wording that would avoid the terms "territorial States" and "sovereign rights". In order to align paragraph 2 with the existing rules of international humanitarian law, it would be wise to replace the expression "the legislation of the occupied territory" with "the laws in force in the occupied territory".

She agreed with the current text of draft principle 20, which should, however, also make it clear that the occupied territory's wealth and natural resources should be exploited and administered for the benefit of the local population and not of the occupying Power. Material in support of that proposition could be found in paragraph 37 of the report.

Although she concurred with the general objective of draft principle 21, its language should be brought more into line with the findings of the International Court of Justice in paragraph 29 of its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*. It could read: "An occupying power shall ensure that activities in the occupied territory respect the environment of other States or of areas beyond national control." That more general wording was part of the corpus of international law on the environment. The meaning of the phrases "shall use all the means at its disposal" and "do not cause significant harm" in the context of occupation could be analysed in the commentary.

She endorsed the Special Rapporteur's proposal regarding future work as outlined in paragraph 100 and agreed that an explanation of how the temporal approach could be applied to situations of occupation should be included in the commentary. Lastly, she was in favour of referring draft principles 19 to 21 to the Drafting Committee.

Mr. Petrič, referring to Mr. Murase's statement, said that the Kosovo Force (KFOR) had operated in Kosovo under Security Council resolution 1244 (1999) and had remained in the country until Kosovo declared its independence in 2008. During that period of time, the United Nations had acted as the *de facto* administration and had therefore also functioned as an occupying Power. Similarly, international organizations had been present in Afghanistan after the fall of the Taliban. The possibility that international organizations could act as occupying Powers should not therefore be ruled out.

Mr. Hmoud, referring to Mr. Murase's comments, said that Security Council resolution 1483 (2003), concerning Iraq, had called on all parties to comply fully with their obligations under international law, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907. The latter were, of course, related to the applicability of the law of armed conflict and therefore to belligerent occupation. Security Council resolution 1546 (2004) had recognized the end of the occupation and the dissolution of the Coalition Provisional Authority. Security Council resolution 1483 (2003) had basically concerned the legality of the use of force in Iraq, which clearly affected the nature of the subsequent occupation.

Mr. Murase, referring to Mr. Hmoud's statement, said that Security Council resolution 1483 (2003) in fact had called upon the Coalition Provisional Authority to promote the welfare of the Iraqi people.

Mr. Murphy said that the Commission should be careful about how it characterized particular situations, including active situations such as the status of the armistice on the Korean Peninsula. Although the point raised was interesting, the Commission should avoid trying to resolve it in the commentary to the draft principles. On the broader issue of whether to couch the draft principles in language that covered international organizations as

well as States, consideration should be given to whether the Hague Regulations of 1907, the Geneva Conventions of 1949 and Protocol I additional thereto applied to international organizations by virtue of their terms or under customary international law.

Although most of the States that had commented on the topic within the Sixth Committee of the General Assembly had seemed to support the Commission's work to date, Czechia, the Russian Federation and the United Kingdom had expressed the view that, as the rules that the Commission had articulated were sufficiently well addressed in existing treaties, it was not adding anything of particular value. The Netherlands had expressed concern about broadening the topic beyond recognized existing rules of international humanitarian law, while the United States of America had urged extreme caution in assuming that anything other than international humanitarian law contributed to law in the area under consideration.

Chapter I of the Special Rapporteur's first report concerned the obligations of an occupying State under international humanitarian law with respect to environmental protection. It was useful that the Special Rapporteur had analysed the international humanitarian law emanating from the dominant sources of law in that area, namely the Hague Regulations of 1907, especially section III; the Fourth Geneva Convention, especially part III, sections I and III; and, for States party to it, Protocol I additional to the Geneva Conventions of 1949, especially article 69.

Chapter II of the report, which attempted to address the application of international human rights law to military occupation, was less successful. It remained ultimately unclear how human rights law altered or shed light on international humanitarian law with respect to occupation. Despite references to the possibility of evolutive interpretation, the report did not give a clear sense of how the propositions of the dominant sources of law could be said to have evolved, even with respect to issues of health. While no particular difficulty arose in terms of the text of the draft principles, which did not refer to human rights law, it was doubtful whether much of what was discussed in chapter II of the report should appear in the commentary.

Chapter III of the report addressed the role of international environmental law in situations of occupation. While that body of law featured in draft principles 20 and 21, it seemed that the rules it contained were being invoked without any real acknowledgement in the text of the draft principles of the unique situation presented by a military occupation. In particular, while the report acknowledged both the variety of circumstances that might exist with respect to military occupation, including its duration and the presence or absence of active hostilities, and the need for an occupying Power to take steps to protect its security, the draft principles seemed to take a "business as usual" approach in their application of international environmental law. It should always be borne in mind that military necessity might require peacetime rules, including in the area of international environmental law, to be set aside.

The amended version of draft principle 19 (1) that the Special Rapporteur had proposed in her introductory statement was an improvement on the version contained in her first report, which arguably expanded the concept of "occupied territory" to include areas that were not the sovereign territory of the occupied State. The standard articulated in paragraph 2 of draft principle 19, however, seemed too stringent. Article 43 of the Hague Regulations, on which it was based, had not really survived into contemporary international law, as acknowledged in the report. Article 64 of the Fourth Geneva Convention established a somewhat more lenient standard that allowed the occupying State greater discretion to modify or enact laws as necessary to provide for its own security and for orderly government and, most importantly, to fulfil obligations owed to protected persons in the occupied territory, including with respect to their health and welfare. Any standard adopted by the Commission should accord the occupying State sufficient flexibility to alter existing law to protect the civilian population in occupied territory, even in the case of pacific occupation. He suggested the following wording for the paragraph, to align it more closely with article 64: "An occupying State shall respect the laws in force in the occupied State pertaining to the protection of the environment, but may alter such laws as necessary to fulfil the occupying State's obligations to the population of the occupied territory, to

maintain the orderly government of the occupied territory, and to ensure the security of the occupying State."

While he sympathized with the overall objective of draft principle 20, the wording was problematic. Existing treaties addressing the issues it covered, especially the Hague Regulations, were mostly in the nature of prohibitions on what an occupying State could do, while the first part of draft principle 20 took a more proactive stance. It called upon the occupying State to "administer natural resources" and "ensure" sustainable use, which might be interpreted as an affirmative obligation on the occupying State to cut down forests, build hydroelectric dams, harvest fisheries, and so on, rather than leaving such resources alone unless they were needed for the purposes of the military occupation or the sustenance of the civilian population. The Commission should not advocate such action by an occupying State. Moreover, the call for an occupying State to ensure "sustainable use" might be read as precluding the use of non-renewable natural resources, such as minerals, oil and gas. In international environmental instruments, the term "sustainable use" was typically used when discussing oceans, biodiversity, fresh water, forests and other renewable resources. Applied in the present context, it would not be consistent with the laws of war, which allowed the occupying State to extract non-renewable resources if necessary to cover the expenses of the occupation or to meet the needs of the civilian population.

The reference in the last clause of draft principle 20 to minimizing environmental harm seemed misplaced. If taken seriously, the clause would arguably mean that there should be no use of natural resources at all, since environmental harm was caused whenever natural resources were used. In situations not involving armed conflict, the standard was correct; indeed, the whole point of the concept of "sustainable development" was not to minimize environmental harm but to balance such harm against the need of society and future generations to use natural resources and ecosystem services for public welfare. Neither the Declaration of the United Nations Conference on the Human Environment of 1972 (the Stockholm Declaration), nor the Rio Declaration on Environment and Development of 1992 (the Rio Declaration), nor the Sustainable Development Goals mentioned minimizing environmental harm. Moreover, in the context of a military operation, such a standard seemed particularly wrong because it appeared to deny the occupying State the ability to use natural resources in the occupied territory for the purposes allowed under the Hague Regulations of 1907, the Fourth Geneva Convention and Protocol I additional to the Geneva Conventions of 1949. Some of those concerns might be addressed by amending the text or including explanations in the commentary; if draft principle 19 were not adopted, however, draft principle 20 might not be needed at all.

The general thrust of draft principle 21 was unobjectionable, though the wording might be improved by the Drafting Committee. The phrase "all the means at its disposal", which was derived from a paragraph in the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and might therefore be appropriate and reasonable in peacetime, seemed less so in the context of a military occupation, especially one associated with ongoing hostilities. It was unreasonable to expect a belligerent engaged in active hostilities while occupying territory to divert "all the means at its disposal" to meet the objective of ensuring that activities in the occupied territory did not cause significant damage to the environment of another State or to areas beyond national jurisdiction. A better and more lenient standard might be to require an occupying State to "take all appropriate measures", echoing the wording of the Commission's 2001 draft articles on prevention of transboundary harm from hazardous activities. Alternative standards might focus on acting with due diligence, which had also been referred to in *Pulp Mills* and other cases and instruments. That said, the threshold of "significant" damage or harm, reflecting the draft articles on prevention of transboundary harm and used in other instruments, was appropriate.

With regard to future work on the topic, he supported the Special Rapporteur's intention of seeking to conclude the first reading of the draft principles in 2019, on the basis of a second report, but disagreed with Mr. Nguyen's suggestion that additional draft principles should be prepared on issues such as the polluter-pays principle, which could detract from the focus of the topic. The aim was not to restate the entire field of

international environmental law, particularly given that many of the rules established by such law did not operate in relation to armed conflict. He supported referring draft principles 19 to 21 to the Drafting Committee.

Mr. Rajput, expressing support for the draft principles proposed by the Special Rapporteur, said that much of the discussion in her first report was based on the application and operation of areas of international law other than humanitarian law, such as human rights or environmental law, in relation to an armed conflict. Due care must be taken in analysing the interaction of norms. The appropriate methodological approach was that taken by the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, in which the Court had discussed the relationship between the International Covenant on Civil and Political Rights and international humanitarian law. The Court had stated:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Accordingly, principles originating in other areas of law might apply but would be overridden by humanitarian law and would be subject to the peculiarities of the situation of conflict.

The law of occupation was the first obvious paradigm from which to identify the onus for protecting the environment after the end of hostilities, pending the transfer of sovereignty back to its legal and legitimate claimants. Article 42 of the Hague Regulations had been recognized as a rule of customary international law by the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, so its status should be respected. It required that authority should be "established" and "actually exercised" over a territory. Some took the view that even temporary loss of control did not change the character of occupation; the Court, however, had insisted on the fulfilment of both requirements, particularly the need for authority to be exercised in the territories claimed to be under occupation, as was clear from the *Armed Activities* case. The Court had also observed that the mere presence of a hostile army was insufficient to prove occupation under article 42 of the Hague Regulations and that there was a need to establish the actual exercise of authority, rather than the mere existence thereof. For the purposes of the present topic, more consideration should be given to when and where the responsibility to take adequate measures to protect the environment would be borne by the occupying State. Even when active hostilities ceased, it was not necessarily the case that the entire region would come under the effective control of the occupying State, and it was therefore advisable for the Commission to follow the threshold of effectiveness set by the Court, rather than the suggestion in the literature that occupation was unaffected by the loss of effective control over some parts of a territory. If an occupying State was to be held responsible for damage to the environment resulting from the actions of others who had effective control over a territory, it could serve as an incentive for such actors to destroy the environment.

The presence and exercise of actual and effective control was particularly important in situations of long-term occupation. Article 42 of the Hague Regulations did not stipulate any time period, and the consequences of occupation were bound to differ depending on how long the situation pertained. Long-term occupation, in particular, entailed the possibility of loss of effective control and damage being caused to the environment by actors other than the occupying State. The text of the draft principles should use the term "occupation" and the commentary should clarify that the elements of article 42 of the Hague Regulations, as interpreted by the International Court of Justice, should be satisfied.

He broadly agreed with the revised version of draft principle 19 (1) proposed by the Special Rapporteur in her introductory statement, but expressed concern over the words "entitled to exercise sovereign rights", which implied that the occupying State had some form of authority or power to exercise sovereign rights over maritime areas. A reference to the "effective exercise of sovereign authority" would be a more appropriate formulation. Article 42 of the Hague Regulations extended only to land territory, not maritime areas, although it could be argued that "territory" should be interpreted broadly and that the Commission should try to develop that area further, taking into account extension of control over maritime areas. At the same time, it was necessary for there to be effective occupation of those areas as well. The two tests articulated by the International Court of Justice would still need to be met.

In the light of the discussion in paragraphs 23 to 26 of the report, the Special Rapporteur was correct in deciding that there was no need to define or reconsider the use of the term "occupation", which would disrupt the relatively settled situation relating to article 42 of the Hague Regulations and the interpretation thereof by the International Court of Justice.

He supported draft principle 19 (2) in its current form. It might be tempting to assume that the imposition of greater obligations on occupying States would strengthen the protection of the environment. However, an occupying State was not the legitimate holder of sovereignty and should not be given excessive authority to legislate. The authority of an occupying State to legislate was rightly curtailed under humanitarian law. He sympathized with Mr. Murphy's suggestion, particularly in view of the fact that the United States of America had implemented measures to improve the protection of human rights in Iraq. In addition, it was possible that an occupying State might wish to introduce higher environmental standards that would have an adverse impact on the domestic economy of a particular territory. For that reason, the Commission should tread carefully. The commentaries would play a critical role in that regard.

With regard to the link drawn in the report between the protection of the environment and property rights under the law of occupation, it was important to clarify the meaning of article 55 of the Hague Regulations. Article 55 concerned public property only. At a stretch, the references in article 55 to forests and agricultural estates could be interpreted in the context of protection of the environment. But the Special Rapporteur had instead chosen to interpret a State's duty to "safeguard the capital" of the "properties" listed in article 55 as including a duty to protect natural resources, which were not mentioned in that article. That seemed a leap of interpretation too far. Nevertheless, the underlying concept in article 55, namely usufruct, could certainly be applied to natural resources. There was some State practice that supported such an interpretation. The concept of usufruct had an important role, as it determined the extent to which an occupying Power could exploit natural resources.

The Special Rapporteur's application of the principle of permanent sovereignty over natural resources to the protection of the environment in relation to armed conflicts was inappropriate. The resolutions that underpinned the principle of permanent sovereignty over natural resources were neither directly nor indirectly linked with the law of occupation or the law of armed conflict. They were instead linked with the economic independence of developing States, freedom from the interference of other States in economic matters and the right of host States to expropriate property owned by foreigners. In addition, permanent sovereignty over natural resources had nothing to do with looting or pillage, which were associated with a distinct area of humanitarian law emanating from article 47 of the Hague Regulations and article 33 of the Fourth Geneva Convention. The application of the principle of permanent sovereignty over natural resources would prevent an occupying State from exploiting natural resources at all, which would exceed the scope of usufruct as contained in article 55 of the Hague Regulations. The same was true of self-determination. The application of self-determination would prevent the occupying State from exploiting the natural resources of the territory even if the requirements of article 55 were met. The cases referred to in paragraph 35 of the report related to self-determination in general and not to the specific context of the exploitation of natural resources. The reference to self-determination in paragraph 122 of the *Legal Consequences of the Construction of a Wall in*

the Occupied Palestinian Territory, which was cited in footnote 140 of the report, related to the planned route of the wall and not to the exploitation of natural resources. There was very little to suggest that the International Court of Justice was dealing with self-determination in the context of natural resources in that case.

A link was made in the report between the protection of water resources and the protection of the environment. It was noted in paragraph 36 of the report that, as article 55 of the Hague Regulations applied only to public property, it covered water in public ownership but not that in private ownership. The distinction between the two was unclear. The specific circumstances would vary from one case to another, which would make it impossible to formulate any general policy recommendations. The treatment of water as immovable property was similarly problematic, as it was treated as movable property in some jurisdictions. In any case, it was not for the Commission to determine whether water constituted movable or immovable property in that context.

The link between the first sentence of article 53 of the Hague Regulations, which related to movable property, and the protection of the environment was also unclear. It was a leap of interpretation too far to claim that that sentence applied to natural resources because it included a reference to movable property and oil was movable once it had been extracted. As the last few words of the sentence made clear, it applied specifically to the movable property used for military operations rather than to movable property in general. Even if oil did constitute movable property, it would have to be used for military operations in order for the first sentence of article 53 to apply. In his view, it was better not to address such matters, which were fairly well settled in international humanitarian law, either in the text or in the commentary.

The same principles applied to the seizure of property. The report sought to establish a link between private property and the protection of the environment. However, the destruction of property was not always prohibited. Indeed, it was justified under article 53 of the Fourth Geneva Convention if it was "rendered absolutely necessary by military operations". Under article 147 of the Fourth Geneva Convention, the destruction of property attracted penal consequences if there was "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". In any event, such matters did not fall clearly within the scope of the topic and should not be taken further.

That discussion ultimately fed into draft principle 20, which declared that the occupying State should administer the natural resources in an occupied territory in a way that ensured their "sustainable use" and minimized environmental harm. However, a higher standard for the protection of natural resources was already set under article 55 of the Hague Regulations, which limited their use to usufruct. There was no universally accepted and recognized formula for determining "sustainable use", whereas usufruct was a clearer and well-settled principle. In his view, draft principle 20 was not really necessary. It interfered with and sought to weaken the pre-existing standard of usufruct, which was not in the interests of the occupied territory.

Turning to draft principle 21, he agreed that the principle of due diligence was appropriate for the regulation of transboundary harm. Due diligence was not an absolute standard but, by its very nature, was subjective and depended on the circumstances of a given situation. In addition, the term "due diligence" had a specific meaning in the context of environmental law. Regrettably, however, it had not been included in the text of draft principle 21. Thus, he proposed that the words "use all the means at its disposal" in that draft principle should be replaced with "exercise due diligence".

He supported referring all the proposed draft principles to the Drafting Committee.

Mr. Gómez-Robledo said that the Special Rapporteur had ensured a successful transition of the Commission's work on the topic. The Commission now had a consolidated draft, which owed a great deal to the previous Special Rapporteur, Ms. Jacobsson, who had continued to contribute to work on the topic since leaving the Commission.

Ms. Lehto's first report dealt with an essential aspect of the scope of the topic, namely the matter of whether the law that governed situations of occupation adequately

addressed the protection of the environment and, if not, what area of international law could be called upon to compensate for the shortcomings of the law on occupation.

The Special Rapporteur's analysis was rigorous. He agreed with her that the legal concepts central to the topic were, for various reasons, evolving. One reason was that the aspirations of formerly colonized peoples had already been incorporated into international law. That was the case for the rights that derived from the principle of permanent sovereignty over natural resources, which, in his view, had no limitations, as they predated even the existence of the State, the holder of those rights being the people or peoples.

The Geneva Conventions of 1949 and the Hague Regulations of 1907 did not fully address the tension that existed in contemporary situations of occupation between the obligation to ensure that the occupied population lived as normal a life as possible, in accordance with article 43 of the Hague Regulations, and the requirements of a hopefully brief period in which the State of the territory maintained its prerogative of sovereignty.

The situations of occupation mentioned in the report did not reflect the full extent of the phenomenon in the modern world. Such situations tended to be prolonged in duration, and the Commission should thus be attempting to develop new rules of international law. In addition to the occupation of Palestine, Jerusalem, the Golan Heights and southern Lebanon by Israel, there were many other situations of occupation or territorial dispute in which one party questioned the presence of another, belligerent or otherwise. They included Western Sahara in Africa; Abkhazia, South Ossetia and the territory of Nagorno-Karabakh in the former Soviet Union; the region of Kashmir, which was the subject of a dispute between India and Pakistan, and, some might argue, the region of Tibet in Asia; and Cyprus, the Serbian province of Kosovo and, more recently, Crimea in Europe. There were no occupied territories in the Americas, although they did have territorial delineation problems of their own.

Those were all examples of occupied or disputed territories in which the situation remained unresolved or in which there at least appeared to be no end in sight. Stagnation was the norm rather than the exception. In that context, he wondered whether the obligations of an occupying Power could be limited to the administration of the territory in the manner of a prudent usufructuary; whether a prolonged occupation was at all compatible with the requirements of sustainable development; to what extent an occupying Power should consult the population of the territory with regard to infrastructure or conservation work required to protect the environment; and to what extent some form of positive collaboration between the sovereign State and the occupied territory could be envisaged.

He was in no way suggesting that the Commission should opt for the "transformative occupation" mentioned in paragraph 46 of the report, and he endorsed the Special Rapporteur's description of the general obligations of an occupying State. In that regard, Security Council resolution 1483 (2003) had clearly authorized the occupying Powers to reform the institutions and administration of Iraq, once the fighting had ended. The Commission did not seem to have decided whether international organizations should be addressed in the draft.

The most fundamental question was whether the occupying State could and should promote the development of the occupied territory. That was not a theoretical question. In the context of a review of the situation in Western Sahara, the Sahrawi Arab Democratic Republic had questioned the validity of the licences that Morocco had granted to French companies for the exploitation and exportation of natural resources in the territory, which had resulted in a somewhat controversial legal opinion delivered by the United Nations Office of Legal Affairs.

In that context, it was important to consider not only situations of direct occupation, but also those of indirect occupation, namely an occupation that resulted from the establishment by the occupying Power of a puppet government to advocate the normalization of the occupation over time and eventually the secession of the occupied territory and the creation of a State under the authority of the occupying Power. Two examples were the establishment by Japan of so-called Manchukuo in the Chinese province of Manchuria and the establishment of the so-called Turkish Republic of Northern Cyprus.

The so-called Republic of Kosovo offered a further example. It had first been occupied by NATO and then, through the administration of the United Nations, had been "normalized" by the European Union.

He was not referring to situations that could be defined as belonging to the category of non-self-governing territories, which continued to be considered by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and might one day gain independence. Those situations did not fall within the scope of the topic.

In other situations, however, the idea should be to identify the rules that gave the occupying State guidance regarding the obligation to restore and maintain public order and civil life in circumstances that approximated peacetime.

In paragraph 62 of her report, the Special Rapporteur had rightly invoked the principle of proportionality, noting that the obligations of an occupying Power should be proportionate to the duration of their occupation. Therefore, the conservationist principle should be interpreted in the light of the needs arising from the duration of the occupation. It was in that context that the possibility of consulting the population should be raised.

It was worth bearing in mind the approach taken towards the management of natural resources in relation to indigenous communities. Of course, the protection of the environment of indigenous peoples was already addressed in draft principle 6, which established the obligation of the State to consult and cooperate with affected indigenous peoples for the purpose of taking remedial measures after an armed conflict.

But it was possible to go a little further. He suggested that the Commission should go back to the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which recognized a raft of rights for indigenous peoples and imposed obligations on States that could include compensation or the restitution of lands and resources. In addition, in 2016, the Organization of American States had adopted the American Declaration on the Rights of Indigenous Peoples.

If those obligations were understood in the wider context of the Sustainable Development Goals, the Commission might be able to consider going beyond draft principles 20 and 21 by exploring the possibility of including situations of prolonged occupation and the need to adopt measures that went beyond the mere management of natural resources and to incorporate an obligation to consult and involve the affected civilian population. The case law of the Inter-American Court of Human Rights might prove useful in that regard. He recalled that the Court had heard a number of cases involving the indigenous peoples of Guatemala and Paraguay.

He was in favour of referring draft principles 19 to 21 to the Drafting Committee.

*The meeting rose at 12.05 p.m. to enable the Drafting Committee on peremptory norms of general international law (*jus cogens*) to meet*